512 - 20845

J. H. ALSDURF, Admr. of the estate of Martin Carra, deceased,
Appellee,

vs.

BIG FOUR WILMINGTON COAL COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

198 I.A. 15

STATEMENT OF THE CASE. This case comes before this court upon an appeal from a judgment of $4000 entered in the Superior Court of Cook County, in behalf of appellee, as administrator, and for the benefit of the next of kin of the estate of Martin Carra, deceased. The suit was commenced under the Mines Act of 1911, to recover for the alleged wrongful killing of appellee's intestate, caused by appellant's alleged wrongful violation of certain provisions of that act.

The deceased was killed by a large stone falling on him on the morning of December 23, 1911, while engaged ~~in his employment~~ as a coal miner in ~~the underground kings of appellant's~~ defendant's mine, near Coal City, Grundy County, Illinois, and while sounding ~~with his pick~~, the roof of the working place, ~~in said mine~~, ~~was killed by a large stone falling upon him~~. The specific acts of wrongful violation ~~by appellant~~ of ~~said~~ the statute, charged in the appellee's declaration, are, in part, failure to have its mine examiner -

(a) inspect the working places of deceased and others before they were permitted to enter the mine on that day;

(b) observe whether there were any dangerous roofs,

(c) place conspicuous mark thereat, as notice for all to keep out,

(d) observe that the roof and walls of the room in which

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STATEMENT OF THE CASE. This case comes before this court upon appeal from a judgment of $4000 entered in the Superior Court of Cook County, in behalf of appellee, as administrator, and for the benefit of the next of kin of the estate of Martin Carre, deceased. The suit was commenced under the Wrongful Act of 1911, to recover for the alleged wrongful killing of appellee's intestate, caused by appellant's alleged wrongful violation of certain provisions of that act.

The cause on the morning of December 23, 1911, while engaged in his employment as a coal miner in the underground workings of appellant's mine, near Coal City, Grundy County, Illinois, and while sounding with his pick the roof of his working place in said mine, was killed by a large stone falling upon him. The specific acts of wrongful violation by appellant of said statute, charged in appellee's declaration, are, failure to have its mine examiner -

(a) inspect the working places of deceased and others before they were permitted to enter the mine on that day,

(b) observe whether there were any dangerous roofs,

(c) place conspicuous mark thereon, as notice for all to keep out,

(d) observe that the roof and walls of the room in which

decedent was working were in a dangerous condition,

~~(e) make a record, in a book kept for that purpose, of~~ any examination of said roof or of the dangerous condition thereof,

(f) take into his possession and give to the mine manager the entrance check of decedent and others whose working places were within said dangerous portion,

(g) submit to the mine manager a report of the mine examiner showing the dangerous condition;

(h) and failure by its mine manager to withhold the entrance checks and to instruct the men not to work in the place until the danger had been removed.

~~The declaration further charges~~ Also that by reason ~~of~~ there ~~such wilful violations,~~ decedent entered ~~said~~ the place in the performance of his duties, and while so engaged ~~at work~~ was killed. ~~as aforesaid~~.

The mine ~~in question~~ is ~~what is~~ known as a long wall mine. A long wall mine is one where all ~~of~~ the coal is taken out and the roof ~~is~~ supported by the brushing or rock ~~which has been~~ taken down. In such a mine, the mining commences in the center, the face or working edge of the layer or seam of coal forming a circle gradually increasing in circumference as the coal is taken out. There were 200 rooms in the mine and two miners worked in each room. The ~~room in question extended to the right and left of a roadway, but more to the right than to the left, and~~ room in question was only three feet in height, ~~which was~~ fewer than the height of the vein or seam of coal. The coal was dug out to a width of four feet underneath the rock or brush not taken down at the end of the roadway, the face of the brush being four feet from the face of the coal.

~~It was the duty of the mine examiner to examine the underground workings of the mine within twelve hours preceding every day upon which the mine was to be operated; to inspect~~

deceased was working were in a dangerous condition,

(e) make a record, in a book kept for that purpose, of any examination of said roof or of the dangerous condition thereof,

(f) take into his possession and give to the mine manager the entrance check of deceased and others whose working places were within said dangerous portion,

(g) submit to the mine manager a report of the mine examiner showing the dangerous condition;

(h) and failure by the mine manager to withhold the entrance checks and to instruct the men not to work in the place until the danger had been removed.

The decision further charges that by reason of such wilful violations, deceased entered said place in the performance of his duties, and while so engaged at work was killed as aforesaid.

The mine in question is what is known as a long wall mine. A long wall mine is one where all of the coal is taken out and the roof is supported by the brushing or rock which has been taken down. In such a mine, the mining commences in the center, the face or working edge of the layer or seam of coal forming a circle gradually increasing in circumference as the coal is taken out. There were 200 rooms in the mine and two miners worked in each room. The room in question extended to the right and left of a roadway, but more to the right than to the left, and was only three feet in height, which was the height of the vein or seam of coal. The coal was dug out to a width of four feet underneath the rock or brush not taken down at the end of the roadway, the face of the brush being four feet from the face of the coal.

It was the duty of the mine examiner to examine the underground workings of the mine within twelve hours preceding every day upon which the mine was to be operated; to inspect

~~all working places therein~~, and to observe whether there were any recent falls or dangerous roofs, and as evidence of his examination of the rooms and roadways therein, to inscribe in some suitable place on the walls of each, not on the face of the coal, with chalk, the month and the day of the month of his visit. On the other hand, it was the duty of every miner to sound and thoroughly examine the roof of his working place before commencing work and if he found dangerous conditions not to work in such dangerous place, except to make such dangerous conditions safe. It was also his duty to properly prop and secure his place for his own safety, with materials provided therefor.

All of the witnesses ~~who testified on the subject~~ agreed that the only means of ascertaining ~~whether or not~~ the roof ~~was sound and safe~~ was by placing one's hand lightly against it ~~the roof~~, at the same time tapping it ~~the roof~~ with a bar, pick or other implement. If the roof was loose or dangerous it would give ~~back~~ a hollow or dead sound and the hand could feel it quiver; while if the ~~stone constituting~~ the roof was sound, or apparently safe, it would give back a ringing or bell like sound, and the hand would feel no quivering or shaking, and ~~that with an experienced miner or mine examiner~~ it can always ~~thus~~ be determined whether or not ~~his~~ the roof is safe.

The only witness to the accident was Frank Aragno, a partner or "buddy" of ~~appellee's~~ intestate, who worked with him. Remigo Sambon, who worked in an adjoining room, and John McNamara, a track layer, were with ~~appellee's~~ intestate ~~a few minutes~~ shortly before the accident, ~~happened~~. Aragno testified that he saw the mark "23", ~~corresponding to~~ the date of the month, on the "brush" above the entrance to their room, before they entered it ~~same~~, indicating that the mine examiner had

examined ~~each~~ the room and that it was safe, but saw no similar mark on the walls of the room. The evidence of the mine manager was that the mark "23" was on the "brush" (at the end of the roadway) and about six or seven feet from where the rock fell. The witness and ~~appellee's~~ intestate upon entering the room, about 7:30 A. M., before commencing work ~~on the day in question~~, sounded the roof with their picks. In the opinion of the witness, ~~everything in~~ the room was in good condition up to the time the stone fell. About 9:00 A. M., ~~appellee's~~ intestate, ~~together with~~ and Aragno, Sambon and the latter's "buddy," took lunch in the roadway nearby. Aragno testified that upon returning to their room, ~~appellee's~~ intestate sounded the roof with his pick at the place where the rock subsequently fell, which was immediately to the right of the roadway, and about five minutes thereafter returned to the same point and while again sounding ~~that part of the roof~~ the stone fell upon him.

Sambon testified that he and ~~appellee's~~ intestate entered the latter's room "the first thing" that morning and found a "squeeze," namely, where a portion of the roof or coal had fallen between his room and that of appellee's intestate. Sambon testified, -

> Q. "Had you seen him go in there that morning to the place where the rock fell on him?"
>
> A. " * * * Yes Sir. But he (~~appellee's~~ intestate) looked -- it was pretty bad. Then he came out and I saw the props * * * he got the props down under it (the stone) * * *. Well you see the props the first thing off in the morning,- he never sounded in the morning at all."

He further testified that he ~~was with~~ and ~~appellee's~~ intestate ~~when the latter with a pick~~ sounded with a pick the roof, that morning between nine and ten o'clock, and that the roof sounded good, ~~to the witness~~. Sambon testified further, that the stone slipped, diagonally, about six inches toward the

face of the coal before it fell. Aragno testified that the top of the stone was damp, smooth and slippery. The stone was seven feet long, three and one-half feet wide in the center, tapering to a point at the right side, and about one to two feet thick. One of ~~appellant's~~ defendants' expert witnesses, who examined the stone after it had fallen, testified that in such a mine a stone can change or break within a few minutes. He described a "slip" as a condition in the top of the stone which can be detected by sounding. Another expert witness, who testified in behalf of ~~appellee~~ plaintiff, stated that if a stone is wet it can be ascertained by examination and the danger determined. Aragno testified in this regard, "It is harder to tell if it (the stone) is solid when it is wet."

The mine examiner, John Thom, testified that he examined the roof of the room ~~in question~~ at about three o'clock on the morning ~~of the happening~~ of the accident, testing the roof with a pick, ~~(instead of a rod or bar, as provided by statute)~~ and stated that there was no loose stone nor dangerous condition ~~there~~. The examiner to get into the room had to pass through a space under the rock or brush three feet in height and four feet in width. On the face of the rock or brush, at the end of the roadway and above the said entrance, he inscribed the mark "23," and did not place any danger mark on the walls of the room ~~in question~~. The testimony of Bambon tended to show that it was customary to place the mark "on the face of the brush or some stone alongside." Thom testified that he also examined the room after the stone fell and that at the time he made the examination before the accident, "there was nothing could have come there * * * except they * * * (Carra and his "buddy") had dug the coal out, that the coal was * * * still covering the place where the

face of the coal before it fell. Jones testified that the top of the stone was long, smooth and slippery. The stone was seven feet long, three and one-half feet wide in the center, tapering to a point at the right side, and about one to two feet thick. One of operator's expert witnesses, who examined the stone after it had fallen, testified that in such a mine a stone can change or break within a few minutes. He described a "fill" as a condition in the top of the stone which can be detected by sounding. Another expert witness, who testified in behalf of operator, stated that if a stone is wet it can be ascertained by examination and the danger determined. Jones testified in this report, "It is harder to tell if it (the stone) is solid when it is wet."

The mine examiner, John Thomas, testified that he examined the roof of the room in question at about three o'clock on the morning of the accident, testing the roof with a pick, (taking as a rule of thumb, as provided by statute, that if there was no loose stone nor dangerous condition, there) the miner to get into the room had to pass through a door in the room or break their feet knight and four feet in width. In the face of the rock or brush, at the end of the roadway and have the usual entrance, he inscribed the mark "A," and did not place any danger mark on the walls of the room in question. The testimony of common laudes to show that it was necessary to place the mark "on the face of the track or some place longside." Thomas testified that he also examined the room after the stone fell and had in the time he made the examination before the accident, "there was nothing could have come down + + + except they + + + (meaning not his "bunny") had dug the coal out. That the coal was + + + still covering the place where the

stone fell, and * * * that before Carra could have gone in there, he would have had to take the coal down." On cross examination he was asked "So you didn't sound it (the roof) at the place where he was killed * * * ?" Answer, "It was too tight * * *. I sounded it after I got through, where I could get my pick to sound it, where the man was killed."

Sambon testified, "Carra did not take down any coal that morning." Aragno testified that appellee's intestate, after lunch, was working under the place where the stone fell and "we had taken the coal out, where Martin ~~(appellee's intestate)~~ was standing, the day before."

~~Appellee's counsel argue that the mine examiner's~~ Plaintiff's testimony, that the coal was still covering the roof where the stone fell, shows conclusively that he had not entered or ~~examined the room in question.~~ ~~Appellee's~~ Plaintiff's witnesses and the mine manager testified regarding falls of coal ~~present~~ at that time in other rooms, some of which ~~rooms~~ were not in use, ~~which condition, it is argued,~~ was sufficient to put the mine examiner upon notice of the danger which existed there. Presence of such falls of coal, ~~including the one in Sambon's room,~~ immediately adjoining that of ~~appellee's intestate,~~ were denied by the mine examiner. *

~~The evidence clearly established the fact~~ Should be construed that ~~appellant~~ appellant maintained no adequate system ~~by which~~ to control the entry of the men into the mine, ~~was controlled~~. The book purporting to contain the record of examinations consisted of a printed form, signed in blank, with a different date originally entered and erased, and the date in question, viz, December 23, 1911, inserted in its place. The mine examiner admitted that he erased dates and signatures in said book and replaced them with others, until a new book was obtained. Examination of this book discloses that such was the practice covering a period of

<u>Lunge Pitt</u>, and - - - that before Gorse could have gone to
there, he would have had to take the coal down." On cross
examination he had added "Do you didn't sound it (the roof)
at the place where he was killed - - - ?" Answer, "It was
too light - - -. I rounded it after I got through, where I
could not get high to sound it, where the man was killed."

Lennon testified, "Gorse did not take them any coal
that morning." Lennon testified that everybody knew
after lunch, was different under the place where the Pitt
and "we had taken the coal out, where Martin (presumably
interpreted his relation, the 'in-law')."

Continuing, Lennon said the main roadway
testimony, that the coal had still remained the roof where the
stone fell. Lennon explained that he had not noticed or
examined the stone or material. Lennon, relatedly and the
main concern [illegible] regarding falls of coal generally, that
time in other rooms, some of which rooms were not in use, work-
conditions, in general, was sufficient to put the mine examiner
upon notice of the danger which existed there. Witnesses of
such falls - - - ed, indicating [illegible] in-coming-in-coal,
inevitably [illegible] of miner's interests, were limited
by the [illegible] rule.

[illegible] relatively [illegible] the first [illegible]
[illegible] to [illegible] upon [illegible] the entry of
the man into the mine, [illegible]. The book concerning to
contain the [illegible] of examinations completed of a printed form,
signed in blank, with a different [illegible] initially entered and
stated, and the date in question, viz, December 16, 1921,
inserted in its place. The [illegible] testified that in
[illegible] and signature in said book was required the
[illegible], until a new book was obtained. Examination of this
book indicated that [illegible] the [illegible] [illegible] of

four years.

The principal issues of fact in this case is whether there was a dangerous condition of the roof in question at the time appellant's mine examiner inspected the mine and whether that condition was of such a character that the mine examiner could, by reasonable inspection, have discovered it. It is admitted that unless the evidence shows that the wilful failure of appellant to perform its duty proximately caused the death of appellee's intestate, there can be no recovery.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Appellant seeks a reversal on the following grounds:

1. The suit is barred by the Statute of Limitations.
2. Errors in giving and refusing instructions.
3. The verdict is against the manifest weight of the evidence.

Suit was commenced on December 21, 1912, by J. H. Alsdurf, Administrator of the estate of Carra Martin, deceased. On January 24, 1913, more than a year following the death of Martin Carra, the court ordered all papers and proceedings in said cause be amended by changing the name of the deceased to read "Martin Carra" instead of "Carra Martin," and on the same day the declaration was filed by appellee as administrator of the estate of Martin Carra, deceased. Did such amendment constitute a new cause of action?

The words "Administrator of the estate of Carra Martin" are mere descriptio personae, and an amendment correcting the error in transposing the names is not a new suit. Wilcke v. Henrotin, 241 Ill. 169, 176, and cases therein cited. The praecipe and summons were not changed by inter-

lineation subsequent to the order of amendment. Such interlineation was not necessary as the order of amendment is sufficient to support the verdict after judgment. Lockwood v. Doane et al., 167 Ill. 235, 239.

Appellant complains of given instructions 1, 3, 4, 5, and 6. Instructions 1, 3, 4, and 6, respectively, are complained of on the ground that they do not point out the issues of fact for the jury to try, but leave it to the jury to determine what the issues are under the statute. A complaint similar to that made as to instructions 1, 3, and 4, was made in U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 533, 534, of an instruction which told the jury, if they found from the evidence that the plaintiff made out his case by a preponderance of the evidence as alleged in the declaration, then the jury should find the defendant guilty etc., and the court said, "This form of instructions has been approved by this court in a number of cases and it is unnecessary to repeat what is said in those cases." - citing numerous cases. In Belskis v. Dering Coal Co., 246 Ill. 62, the court on page 69 says, "While the practice of giving such an instruction is not to be commended, it is not reversible error where every count in the declaration contains the necessary allegations for recovery." In the latter case, the instruction given was similar to the sixth instruction in the instant case, andit was there argued that the court erred in giving an instruction which in effect told the jury that a recovery could be had for any injury or death of which the wilful violation of the Mining statute by the plaintiff in error was the proximate cause, regardless of whether or not such violation was charged in the declaration. In that case, as in the instant case, the instruction did not

instruction subsequent to the order of amendment. Such instruction was not necessary as the order of amendment is sufficient to support the verdict after judgment. Lockwood v. Jones et al., 107 Ill. 395, 398.

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direct a verdict, and other instructions given for plaintiff in error, as in the instant case, stated fully that there could be a recovery only for violations of the Mining statute as charged in the declaration. The court held that instructions must be taken as a series and that there was no error in giving the instruction complained of .

It is argued that the fifth instruction is erroneous for a number of reasons; that it speaks of appellant as (a) wilfully failing to inspect the place where appellee's intestate was required to work, (b) failing to observe whether there were any recent falls or dangerous roof, and (c) that it submits to the jury the question as to whether appellee's intestate had been directed by appellant to enter the place in question, when there is no evidence in the record of such direction on the part of appellant.

Paragraph 4, of section 21, of the Mining Act of 1911, imposed upon the mine examiner the duty to observe whether there were any recent falls or dangerous roofs. It is not contended by appellant's counsel, that appellee's intestate was not acting within the scope of his employment at the time of his death, and, therefore, no evidence was necessary of any specific direction to appellee's intestate on the part of appellant. After reciting the allegations of the declaration, the instruction continues, "If the jury believe from the evidence that the roof of the room, where plaintiff's decedent was killed, was in a dangerous condition, and that said dangerous condition could have been ascertained by the mine examiner within twelve hours preceding the day aforesaid, and that the defendant was guilty of the wilful omission alleged in the declaration as aforesaid * * * ." The contention of counsel, that this portion of the instruction assumes that the roof was in a dangerous condition, is without

direct a verdict, and other instructions given for plaintiff in error, so in the instant case, stated fully that there could be a recovery only for violations of the mining statute as charged in the declaration. The court held that instructions must be taken as a series and that there was no error in giving the instruction complained of.

It is argued that the fifth instruction is erroneous for a number of reasons; that it assumes of appellant as (a) wilfully failing to inspect the place where appellee's intestate was required to work, (b) failing to observe whether there were any recent falls or loose roof, and (c) that it submits to the jury the question as to whether appellee's intestate was been injured by appellant's to order the place in question, when there is no evidence in the record of such direction on the part of appellant.

Instruction 4, of section 11, of the Ohio Act of 1911, imposed upon the mine manager the duty to inspect working places for loose roof and falls of dangerous rock. It is not mentioning of appellant's present, that appellee's intestate was not acting within the scope of his employment at the time of his death, and, therefore, no evidence was necessary of any specific direction to appellant's intestate on the part of appellant. After reciting the allegations of the declaration, the instructions continues, "If the jury believe from the evidence that the roof of the room, where plaintiff's decedent was killed, was in a dangerous condition, and that said dangerous condition could have been ascertained by the mine manager within twelve hours preceding the injury complained, and that the defendant was guilty of the wilful omission alleged in the declaration as aforesaid * * *."

The contention of counsel, that this portion of the instructions assumes that the roof was in a dangerous condition, is without

merit. It is also urged that because this instruction says that, "If the jury believe * * * said dangerous condition could have been ascertained by the mine examiner within twelve hours preceding the day aforesaid * * *," that the jury in effect were told that it was the duty of appellant to inspect all places in the mine, continuously, for twelve hours preceding the beginning of the day in question. This part of the instruction clearly presents the issue as to whether there was a dangerous condition which could have been discovered at any time prior to the commencement of the working day of appellee's intestate. There was no error in giving this instruction.

The instructions offered by appellant and refused by the court were fully covered by other instructions given in behalf of appellant, and the instructions given as a whole correctly and clearly present appellant's theory of defense and the law applicable thereto.

It is further urged by appellant's counsel that the verdict is contrary to the weight of the evidence. It is contended that there is no evidence in the record which even tends to show that there was a dangerous condition existing in Carra's room, at three o'clock on the morning of December 23, when John Thom, the mine examiner, made his examination of the room. It is further urged, that even if there were a total failure on the part of the mine examiner to inspect the room, that appellee could not recover, because, it is urged, there was no dangerous condition present either at 3:00 o'clock in the morning, or at 7:30 or at 9:30 of that day. It is further urged that no dangerous condition could have been discovered by any reasonable inspection, and that, therefore, the failure to inspect could not have been the

proximate cause of the death of appellee's intestate, because all of the tests of the roof made on that morning, showed the roof to be in good condition, and no other method could have been employed if inspection had been made. In Henrietta Coal Co. v. Martin, 231 Ill. 460, 468, the court said, "Appellant urges, however, that even if the examiner did not comply with the statute in this respect, his failure so to do is not the proximate cause of this accident. The evidence shows that if the examiner had properly examined the entry where appellee and Zak worked he would have found the roof to be dangerous, and had he made a record to that effect and placed the conspicuous marks required by the law, it is fair to presume that appellee and Zak would not have been permitted to enter, and would not have entered, (for the purpose of mining,) the place where they worked, until after the conditions there had been made safe. Cunningham's wilful failure to examine the mine in the manner required by law, which the evidence tends to show, and his failure to make a record of the facts which such an examination would have revealed, and his failure to make the marks indicating danger at appellee's working place, contributed directly to cause the injury to appellee."

Whether the mine examiner inspected the roof of the room at the time in question was for the jury to determine. The testimony of the mine examiner as to physical conditions of said room on the morning in question, cannot be reconciled with the testimony of appellee's witnesses in that regard. Indeed, the testimony of the mine examiner without regard to the testimony of Aragno and Gambon tends strongly to show that he did not examine that part of the roof which fell. The jury had the right to infer from the evidence, either (a) that the slip or dangerous condition of the stone, with its wet, smooth and

slippery surface which was present at the time of the happening of the accident existed at 3:00 o'clock on the morning in question, or (b) that the stone changed and broke within a few minutes preceding the killing of appellee's intestate. There was no evidence to the effect that the appearance of the stone after it had fallen, indicated any sudden change or breaking thereof. The placing of props under the stone by appellee's intestate, and his repeated tests as to its safety on the morning in question, indicated anxiety or doubt in his mind, as to its condition. The evidence clearly establishes the fact that the mine examiner in the exercise of reasonable care could have discovered such dangerous condition, if it existed.

While it was the statutory duty of appellee's intestate, to sound and thoroughly examine the roof of his working place before commencing work, there is nothing in the statute that relieves the operator, under such circumstances, from the duty to inspect, enjoined upon it by this act. Davis v. Missouri & Illinois Coal Co., 186 Ill. App. 478, 486. Appellee's intestate had a right to rely upon the performance of the mine examiner's duty, and the absence of a mark in such working place indicated the opinion of the mine examiner that the roof was not dangerous and decedent cannot be held guilty of contributory negligence in working under the stone. Piazzi v. Karma-Donnegald Coal Co., 262 Ill. 30, 35.

It is not contended, even if appellee's intestate was guilty of contributory negligence, that it is any defense to this action, if the appellant was guilty of wilful violation of the statute. "A wilful violation within the meaning of the statute signifies a conscious violation

thereof." Marquette Coal Co. v. Mielie, 208 Ill. 116, 122. As said in Kellyville Coal Co. v. Strine, 217 Ill. 516, page 526, "Where so large a number of persons are engaged in a productive industry as in coal mining in the State of Illinois, and where the work is of such a character that it is recognized as being attended with unusual hazards and dangers, the constitution requires that legislation shall be had for the purpose of protecting those thus engaged from the known extraordinary hazards and dangers. In the construction and equipment of mines, therefore, the act requires the discharge of specific duties, so that the utmost safety can be extended to the miners. This requirement of the constitution is sought to be met by this legislation, which directs the owner, operator or manager to make provision for the safety of the miners employed within the mine. Where an owner, operator or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein." The miner under the statute is entitled to the benefit of the superior knowledge and experience of the officers charged with the duty of discovering conditions of danger in the mine. Wells v. Lunaghi Coal Co., 185 Ill. App. 404, 411.

While the evidence in this case tends to show that in such a mine a stone can change or break within a few minutes, the evidence also discloses that the condition of the stone could have been discovered by examination at any time within twelve hours preceding its fall.

Under all the facts and circumstances in evidence, it was for the jury to determine whether such dangerous condition existed at 3:00 o'clock on that morning, and whether the mine examiner in the exercise of reasonable care could have dis-

the "rule." Pittsburgh Coal Co. v. Aiello, 800 Ill. 116, 122.
As used in Belleville Coal Co. v. Bilyeu, 327 Ill. 516, page
518, "where as large a number of persons are engaged in a
productive enterprise as in coal mining in the state of Illinois,
and where the risk is of such a character that it is recognized
as being attended with unusual hazards and dangers, the
constitutional requires that legislation shall be had for the
purpose of protecting those thus engaged from the known
extraordinary hazards and dangers. In the construction and
equipment of mines, for instance, the act requires the discharge
of specific duties, so that the mines may be operated
by the miners. This requirement of the constitution is sought
to be met by this legislation, which directs the owner, operator
or manager to make provision for the safety of the miners
employed within the mine. There is no doubt, operator or manager
no contractor, or agent who may be immediately operates it
without concurring in the performance of this act, he willfully
disregards the provisions and willfully disregards the safety
of miners employed therein." The manner under the statute in
question is the result of the superior knowledge and experience
of the officers charged with the duty of discovering conditions
of danger in the mine. Gulla v. Industrial Com., 292 Ill. App.
405, 411.

Only the witnesses in this case tends to show that
in such a mine a miner can change or break within a few
minutes, the witnesses also disclosed that the condition of the
roof could have been discovered by examination at any time
within months a mine preceding the fall.

Under all the facts and circumstances in evidence,
it was for the jury to determine whether the defendant
violated at 5:00 o'clock on that morning, and whether the mine
examiner in the exercise of reasonable care could have

covered same, and if he failed to do so, whether such failure on his part, was the proximate cause of the death of appellee's intestate. We are unable to say, after a careful and exhaustive review of the record in this case, that the verdict is contrary to the manifest weight of the evidence, and finding no prejudicial error, the judgment of the Superior Court will be affirmed.

JUDGMENT AFFIRMED.

covered mens, and if he failed to do so, whether such failure on his part, was the proximate cause of the death of appellee's intestate. We are unable to say, after a careful and exhaustive review of the record in this case, that the verdict is contrary to the manifest weight of the evidence, and finding no prejudicial error, the judgment of the Superior Court will be affirmed.

FOREMAN, JUSTICES.

666 - 21004

MARTHA SCHRECHTMAN, Appellee,	)	
	)	APPEAL FROM
vs.	)	SUPERIOR COURT,
	)	COOK COUNTY.
CHICAGO RAILWAYS COMPANY, Appellant.	)	

198 I.A. 23

STATEMENT OF THE CASE. This appeal is prosecuted to reverse a judgment obtained by appellee, the plaintiff, against appellant, the defendant, in the Superior Court of Cook County, for $2000 and costs, as damages for injuries alleged to have been sustained by her while attempting to alight from one of defendant's street cars on which she was a passenger for hire.

~~The testimony of~~ plaintiff's ~~attending~~ physician ~~was~~ testified, in effect, that on ~~the night of~~ September 11, 1911, about two hours ~~following~~ after the occurrence, he found ~~upon examination of plaintiff's body~~, a large bruise upon her hip; bruises upon her left thigh and back, and, ~~upon~~ the following day, a slight bloody discharge from the vagina, which ~~discharge~~ continued for about a week and that he ~~had~~ continued to treat her "off and on" for pain in the back, especially on the left side, and for retroversion of the uterus. ~~Upon examination~~ Three or four weeks before the trial, he found the uterus turned backward. ~~The witness~~ He testified that he had known the plaintiff for ~~a period of~~ six or seven years; ~~that he~~ attended her at ~~the time of~~ the birth of her first child, more than two years before the accident; that six weeks after ~~the~~ birth ~~of the first child~~, he found, ~~upon examination~~, plaintiff's uterus to

[illegible]
Appellee,

vs.

[illegible]
Appellant.

Appeal from
[illegible] Court,
COOK COUNTY.

1901 A. 29

PRESENT: [illegible] THE CLERK. This appeal is prosecuted to reverse a judgment obtained by appellee, the plaintiff, against appellant, the defendant, in the Superior Court of Cook County, for $2000 and costs, in damages for injuries alleged to have been sustained by her while attempting to alight from one of defendant's street cars on which she was a passenger for hire.

The testimony of plaintiff's accompanying physician was, in effect, that on the eighth of September 11, 1901, about ten o'clock forenoon the conductor, he found upon examination of plaintiff's nose, a large bruise upon her chin; bruises upon her left thigh and back, and, the following morning, a slight bloody discharge from the vagina, which discharge continued for about a week and that he treated complained to treat her "off and on" for pain in the back, especially on the left side, and for retroversion of the uterus. Her examination began or four weeks before the trial, he found the uterus turned backward. The witness testified that he had seen the plaintiff for a period of six or seven years, that she had attended her to the time of the first child, some time two years before the accident; that she was after the birth of another child, he found, upon examination, plaintiff's uterus in

be normal in size. "Involution was practically complete at that time." ~~The witness~~ He further testified that at the time of the accident plaintiff was in good health.

A motion ~~of defendant's counsel~~ to strike out the ~~foregoing~~ testimony with reference to retroversion of the uterus, as not connected with the accident ~~in question~~, was denied.

The plaintiff was three months advanced in pregnancy at the time of the accident and gave birth to a child six months thereafter.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The defendant seeks a reversal on the following grounds:

(a) Error in overruling defendant's motion to strike out certain testimony of plaintiff's physician.

(b) Error in giving certain instructions.

(c) The damages are excessive.

The evidence of the attending physician of plaintiff tended to prove that the conditions complained of by plaintiff at the time of the trial were the result of the accident in question, and the motion to strike out was properly denied.

One of the instructions complained of, is as follows:

> "The jury are instructed that the law requires the employes of common carriers to do more than to stop reasonably long enough for passengers to safely alight from its cars. They are bound and required to ascertain and know that no passenger is in the act of alighting from the car before putting it in motion again. If an employe fails in that respect, then such failure is imputed to his employer and is actionable negligence on the part of the employer, provided the passenger was at such time not guilty of contributory negligence."

In Louisville & S. I. Traction Co. v. Korbe, 94 N. E. 768,

be moved in size. Invasion was practically complete at that time." The witness further testified that at the time of the accident plaintiff was in good health.

† Quotation of defendant's counsel to strike our the concerning testimony with reference to recuperation of the uterus, as not connected with the accident complained, was denied. †

The plaintiff was large for the advanced in pregnancy at the time of the accident and gave birth to a child six weeks thereafter. †

III. Liability depends upon the question of the jury.

The defendant asks . instruct on the following elements:

(a) Error in operation, and doctor's decision to strike out certain testimony of plaintiff's witnesses.

(b) Error in giving certain instructions.

(c) The damages are excessive.

The evidence of the attending physician of plaintiff tended to prove that the conditions complained of by plaintiff at the time of the trial were the result of the accident in question, and the motion is clearly not for directing verdict.

The 7 the instructions complained of, is as follows:

"... Some jury are instructed that the law requires the exercise of common carriers to be more than to stop passenger land enough for passengers to safely alight from its cars. They are bound and required to exercise and have that no passenger in the act of alighting from the car before public, it is notice again. If an employee fails in that respect, then such failure is imputed to the employer and is actionable negligence on the part of the employer, providing the passenger was at such time not guilty of contributory negligence."

769, the court instructed the jury in part as follows: " * * * You are instructed that stopping a reasonable time for a passenger to alight from such car is not sufficient but it is the duty of the conductor or other person in charge of a street car to see and know that no passenger is in the act of alighting from such car or in a dangerous position before putting the car, of which he is in charge, in motion." In commenting on this instruction the court said, " * * * The vice of this charge was that thereby the trial court informed the jury as a legal proposition that it is the duty of the conductor or other person in charge of a street car to see and know that no passenger is in the act of alighting therefrom or in a dangerous position before putting the car in motion; that the jury was thereby given to understand that under all circumstances it is the duty of the conductor in charge of a street car to see and know that no passenger is in the act of alighting from such car. Counsel for petitioner cite no authorities which can be said to uphold the correctness of the charge in question. * * * "

The foregoing opinion is in harmony with the uniform line of decisions in Illinois. Tri-City Ry. Co. v. Gould, 217 Ill. 317, 321; Simmer v. Chicago Railways Co., 185 Ill. App. 523, and cases therein cited.

What constitutes negligence is a question of fact and not of law. The giving of the foregoing instruction was reversible error.

REVERSED AND REMANDED.

449 - 21847

WILLIAM A. MURTEM,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

198 I.A. 28

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, alighting from one of defendant's street cars, was injured. He brought suit for damages, alleging that the car had been stopped for him to alight and while he was in the act of alighting it suddenly started with a violent jerk, throwing him to the ground. The verdict of the jury was favorable to him and he had judgment for $1,600.

We have concluded to reverse this judgment for the reason that the evidence fails to prove that the accident happened as plaintiff alleged; it clearly appears that he alighted from the car before it arrived at its usual stopping place and while it was in motion.

Plaintiff lived on East 29th place near Indiana Avenue, in Chicago. He was riding homeward on a southbound Indiana avenue car. His daughter, about 15 years old, was with him. He was carrying quite a load of provisions of one kind and another in different parcels. He testified that as the car neared 29th street the conductor called out the number of the street; that plaintiff and his daughter went to the rear door; that the car came to a complete standstill about two car lengths north of 29th street, and that as he stepped down, still having one foot on the car step, the car suddenly started, throwing him down. His testimony is corroborated in

DEFINITION OF DEGREES OF THE CRIME.

Suddenly, standing from one of Indianapolis street corners, was injured. He brought suit for damages, alleging that the car had been driven for him in a manner and while he was in the act of alighting it suddenly started with a violent jerk, throwing him to the ground. The verdict of the jury was favorable to his and he had judgment for $1,000.

The defendant in error made his judgment for the reason that the evidence tends to prove that the accident happened as claimed; although it clearly appears that he alighted from the car before it arrived at the usual stopping place and while it was in motion.

The entire lived on East 10th place near Indiana Avenue, in 1[illegible] cents. He was riding forward on a southbound Indiana avenue car. His daughter, a girl 13 years old, was with him. He was carrying quite a load of provisions of one kind and another in different baskets. He testified that as the car reached 10th street the conductor called out the number of the street and his daughter went to the front door and alighted and his daughter went to the front door and alighted. He was close to a complete standstill when the car reached the south side of 10th street, and had so he stepped down, still having one foot on the car step, the car suddenly started, throwing him down. His testimony is corroborated in

certain respects by his daughter. It is not disputed that the accident happened some distance north of the usual stopping place of the car.

The story of plaintiff and his daughter was contradicted by at least seven witnesses, most of them passengers. Their stories are so clear and consistent as to convince us of their truthfulness. These witnesses substantially agreed that when the car was 100 or more feet north of 26th street plaintiff walked to the rear of the car, followed by his daughter; that the car was then in motion, going 6 or 7 miles per hour, slowing down; that the conductor warned plaintiff not to alight until the car had stopped, but plaintiff proceeded, with his arms full of bundles, to step off, and as soon as he landed on the street pavement seemed to lose his balance and fall; that the daughter started to follow but was stopped by the conductor, who barred her way with his arm, and she waited until the car stopped and then alighted and walked back about 80 feet to where plaintiff was.

The verdict finding defendant guilty was not only manifestly opposed by the greater weight of the evidence, but the manifest preponderance of the evidence supported defendant's theory as to the facts. Plaintiff is not entitled to recover, and the judgment is reversed without remanding the cause.

REVERSED.

[illegible] by his daughter. It is not difficult [illegible] that the accident happened some distance north of the [illegible] place of the car.

The story of [illegible] and his daughter [illegible] by at least seven witnesses, most of them passengers. These witnesses are reliable and [illegible] of their truthfulness. These witnesses substantially agreed that when the car was 100 or more feet south of [illegible] the plaintiff walked to the rear of the car, followed by [illegible]; that the car was then in motion, going [illegible] miles per hour, slowing down; that the plaintiff [illegible] until the car had stopped, [illegible] the curb of [illegible], to step off, [illegible] the street pavement [illegible]; that the daughter [illegible] by the conductor, who barred her way with his arm, and who waited until the car stopped and then alighted and walked back about 50 feet [illegible].

The verdict [illegible] not only [illegible] by the [illegible] of the evidence, but the [illegible]. [illegible] is not entitled to recover, [illegible] without remanding the case.

FINDING OF FACT.

The court finds that the defendant was not guilty of the negligence charged in plaintiff's declaration.

489 - 21887

WESLEY SHINSALL,
Appellee,

vs.

ERNST F. LEHMANN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

198 I.A. 29

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In a case of the first class in the Municipal Court, an action for goods sold and money loaned, defendant filed an affidavit of defense as follows:

> "Defendant believes that he has a good defense upon the merits to the whole of the plaintiff's demand, as follows: The whole sum, exclusive of interest, sued for, including item for diamond ring and money loaned, was, on or about July 26, 1913, paid by defendant and thereafter received by plaintiff; as to item of interest sued for, on ground of alleged vexatious delay in payment, the nature of the defense thereto is, that said payment included interest up to the time thereof, and, in addition, there was, and has been, no vexatious delay in payment."

Upon motion of plaintiff the court struck the affidavit from the files and entered judgment against defendant.

Plaintiff contends that the affidavit is insufficient under the rules of the Municipal Court; defendant argues that it is sufficient. The rules of the Municipal Court, which have been properly preserved for our review, provide that defendant shall file an affidavit that he believes he has a good defense upon the merits, "specifying the nature of such defense, whether by way of denial or by way of confession and avoidance in such a manner as to reasonably inform the plaintiff of the defense which will be interposed at the trial." By Rule 20 it is provided that it shall not be sufficient for defendant's affidavit "to deny generally the facts alleged by the statement of

claim * * *. Any denial of any allegation of fact made by the opposite party must not be evasive but must answer the point of substance."

We do not understand that these rules require evidentiary facts to be pleaded. We have held allegations similar to the one now before us to be sufficient. Allen v. Roughan, 175 App. 380; Hayes v. Page, 175 App. 410; Haskey v. Mendelson, 191 App. 597.

The plea that before action the defendant satisfied and discharged the plaintiff's claim by payment is a good plea. 2 Chitty on Pleading 446.

We hold that the affidavit was in compliance with the rules of the Municipal Court and that it was error to strike it from the files. Defendant was entitled to go to trial upon the issues made. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

539 - 21937

FRED F. ROBERTS, Admr. of the Estate of Alfred Smith, deceased, Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

198 I.A. 31

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action for damages for wrongfully causing the death of plaintiff's intestate judgment was entered against defendant for $1,750.- manifestly a compromise verdict.

This case has been tried three times. From the judgment on the second trial appeal was taken to the Appellate Court, and a majority of the branch court which had the case under consideration were of the opinion that the judgment should be affirmed. (See 177 App. 400.) A writ of certiorari was granted by the Supreme Court, and the judgments of the Superior and Appellate Courts were reversed. The case is reported in 262 Ill., 228. The facts involved are narrated at length in these opinions and will not be repeated. The Supreme Court in its opinion said (p.231):

> "The evidence, in the light most favorable to the plaintiff, with all the inferences that could be legitimately drawn from it, did not tend to prove any fault or neglect on the part of the defendant or the exercise of ordinary care on the part of Smith. The question whether Smith exercised ordinary care is to be determined, not by the probabilities when he left the sidewalk, but rather by the situation when he reached the tracks and attempted to cross between the approaching cars when the street was clear and there was no obstruction to the view and no necessity for making the attempt. The evidence established that Smith misjudged his ability to cross the two tracks between the approaching cars, and on account of his error of judgment, for which no one else could be held responsible, he lost his life. Smith could

see both cars and the entire situation was open before him. He was not on any crossing for pedestrians and needed no warning or signal that the two cars were approaching each other,- a fact that no one could fail to observe. The evidence raised no issue of fact proper to be submitted to a jury, and the court erred in not directing the verdict."]

The facts adduced upon the present trial do not differ materially from those which were considered by the Supreme Court. Its conclusion as to the alleged negligence of the defendant and the contributory negligence of plaintiff is controlling upon the present appeal.

It is asserted by plaintiff that this case is different in that it is now claimed in an additional count that defendant was guilty of a violation of the municipal ordinance requiring a fender to be attached to the front of the car in such a manner that pedestrians would not be injured or thrown under the wheels of the car, and that the violation of this ordinance was the proximate cause of intestate's death. It is sufficient to say that it was proven not only that the car was equipped with the required fender but that the presence or absence of a fender had nothing to do with the accident, but even were defendant guilty as to the fender count the contributory negligence of plaintiff would preclude a recovery.

The judgment is reversed without remanding the cause.

REVERSED.

FINDING OF FACTS.

The court finds that defendant was not guilty of the negligence charged in plaintiff's declaration, and that the contributory negligence of plaintiff's intestate was the proximate cause of his death.

440 - 21838

KISSEL MOTOR COMPANY, a corporation,
Appellant,

vs.

RUDOLPH DOCAUER and ADOLPH DOCAUER,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

198 I.A. 43

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

November 1, 1912, defendants, Rudolph and Adolph Docauer, bought of the plaintiff, the Kissel Motor Company, an autotruck, and in part payment therefor gave twelve notes for $125 each, one thereof payable on or before the 6th day of each succeeding twelve months, and to secure said notes gave a chattel mortgage on the truck purchased. The defendants and their brother Jerry were partners in an auto express business. The first four notes falling due were paid, and the controversy is as to the note which fell due April 6 and the one which fell due June 6th. Jerry Docauer testified that he and Adolph called on Mr. Rix, the assistant manager of plaintiff in Chicago, about April 1, and told him that they had some money coming from plaintiff and wanted a statement; that Rix said, "Never mind the April note; that he would furnish us a statement of all our credits, and if there was anything to be paid for these two April notes that we would pay the balance, and he agreed to it that he would send us our statement."

Rix died before the trial. The contention that the Court erred in admitting the testimony of Jerry as to the conversation with Rix cannot be sustained. Jerry Docauer was not a party to the suit and was not precluded from testifying by the statute.

The Court gave for the defendants the following instruction:

"The jury are further instructed that if they believe from the evidence that the defendants requested the plaintiff company manager to apply credits claimed by them to be due from the company toward the payment of the April note, and that such manager stated, in substance, that he would do so, and requested them not to pay any further attention to the April note until he rendered them a statement of such credits and that the statement of account was not thereafter rendered them, and that no demand or request was thereafter made upon the defendants for payment of such note, such facts will void any right which might otherwise accrue to the mortgagee company, plaintiff herein, to forfeit the mortgagors' interest in the property, as for a default of the mortgage terms for failure to pay said April note, until such time as the mortgagee company should render such statement and demand payment thereof."

The Court erred in giving this instruction - First: Because it is not founded on the evidence. The defendants requested Mr. Rix to apply credits due defendants and their brother Jerry, and not alone credits due the defendants. Second: There was no valid agreement for an extension of the time of payment of the April note; and an extension of time for payment entered into prior to the falling due of the note must be for a definite time.

Lanum v. Harrington, 267 Ill., 57.

Again, the testimony does not show that a fixed amount was to be collected on the note, nor does it show any consideration for the alleged promise of plaintiff made through Rix. The defendants did not agree to keep the money and pay interest on it for any definite time, nor did they pay interest in advance.

Cwossman v. Wohlleben, 90 Ill. 537;

Julin v. Bauer, 82 Ill. App. 157.

At the time of the trial all the notes were due, the condition of the mortgage was broken, and the plaintiff was entitled to the possession of the mortgaged property, and in no event should there have been an order for the return of the property.

Sec. 22, chap. 119, R. S.;

Farwell v. Hanchett, 126 Ill., 573;

Chase Bros. v. Conners, 182 Ill. App. 418.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

446 - 21844

OLIVER W. HOLMES, JAMES M. PYOTT, and DAVID A. PYOTT, doing business as HOLMES, PYOTT & COMPANY, a co-partnership, Appellees, vs. DAVID SUFFRIN, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 45

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The defendant Suffrin was the owner of a building in Chicago and June 7, 1911, contracted with the United Construction Company for the remodeling and improvement of his building. The Construction Company June 8 made a contract with plaintiffs to furnish and erect the structural and ornamental iron and steel work required in such improvement for the sum of $2189. The contract between defendant and the Construction Company included a waiver of the right to a mechanic's lien, but this was not known to the plaintiffs until after the controversy out of which this suit grew had arisen. The Construction Company failed to pay plaintiffs the amount due them under the contract as the same became due. The contention of appellees is that Suffrin promised, in case the plaintiffs would proceed with and complete the work they had undertaken, to pay them the amount due and to become due, and that this was a direct and original promise and not within the Statute of Frauds; that the promise to pay the plaintiffs was based on a sufficient consideration and therefore was original so far as defendant was concerned.

That the promise was made was testified to by Retchin, Holmes, Pyott, Anthony, Forcey and Shober, and denied by Suffrin. From the evidence the jury might properly

find that the promise was made by defendant.

The question whether the promise was a direct and original promise, and therefore not within the Statute of Frauds, or was a promise to pay the debt of the Construction Company and therefore void under the statute, presents more difficulty. The account in question was charged on the books of plaintiffs to the Construction Company. This fact, if unexplained, would be strong evidence to show that the credit was given to the Construction Company, but is not conclusive of such fact.

Lusk v. Throop, 189 Ill. 127;

Ruggles v. Gratton, 50 Id. 412;

Green v. Burton, 59 Vt. 424;

Walker v. Hill, 119 Mass. 249;

1 Reed on Statute of Frauds, Sec. 90.

It is possible for one to make a valid oral promise without releasing the original debtor.

McLaughlin v. Austin, 104 Mich. 487;

Howell v. Harvey, 65 W. Va. 310; 22 L.R.A., N. S., 1027; where there is a note in which the authorities on the question are cited and examined. In the opinion in the case last cited it was said:

"The rule by which to determine whether a promise is original or collateral and without consideration, is thus stated in 29 Am. & Eng. Ency. Law, 2d ed. p. 929: 'An absolute promise to pay the debt of another is not within the statute, though the liability of the original debtor still subsists, where the leading object of the promisor is to subserve some pecuniary interest or business purpose of his own, and he receives a benefit which he did not before enjoy and would not have possessed but for the promise.' In support of the text a large number of authorities are cited, among them the case of Emerson v. Slater, 22 How. 28, 16 L. ed. 360, which seems to be a leading case upon the subject. That case is so very similar to the one now under consideration that we think it well to state it. The plaintiff, Emerson, had been employed by a railroad company to build certain bridges. The Company failed to make payments according to agreement, and Emerson refused to proceed with the work. The defendant was a large stockholder in the road, and had leased to it large quantities of railroad iron, and held an assignment of the earnings of the road to secure payments on his lease. The

that the promise was made by endorsement.

The question whether the promise was a direct and original promise, and therefore not within the statute of Frauds, or was a promise to pay the debt of the construction Company and therefore void under the statute, presents more difficulty. The account in question was charged on the books of plaintiffs to the Construction Company. Could that, if unexplained, with no strong evidence to show that the credit was given to the Construction Company, but is not conclusive of such fact.

Case v. Tabors, 1 Pr. 173, 327;

Chandler v. Grattan, 2 Ir. Ch. 416;

Green v. Carlton, 27 Vt. 434;

Palmer v. Hall, 12 Mass. 349;

1 Lomax on Agency of Brooks, 2nd. Ed.

It is possible for one to make a valid oral promise without releasing the original debtor.

Lamphrey v. Parker, 114 Ind. 487;

Farrell v. Cleaver, 10 [illegible]. Pa. 310; 22 L.R.A.,

[illegible], 1047; where there is a note in which the authorities on the question are cited and examined. In the opinion in the case last cited it was said:

"The rule by which to determine whether a promise is original or collateral and without consideration, is thus stated in 22 L. R. A. Rep. 1, 2d ed. p. 910: 'An absolute promise to pay the debt of another is not within the statute, though the liability of the original debtor will cease, where the leading object of the promisor is to subserve some pecuniary interest or business purpose of his own, and he receives a benefit which he did not before enjoy and would not have possessed but for the promise.' In support of the text a large number of authorities are cited, among them the case of Pierson v. Hooker, 3d Sup. 12 N. Y. 401. This case would seem to be a leading one upon the subject. That case is so very similar to the one now under consideration that we quote it only in part. The plaintiff, Pierson, had been employed by a railroad company to build certain bridges. The company failed to make payments according to agreement, and Pierson refused to proceed with the work. The defendant was a large stockholder in the road, and had loaned it large sums, ostensibly for purchasing iron, and held an assignment of the earnings of the road to secure payments on his loans. The

road could not operate and there could be no earnings until the bridges were completed. Under these circumstances the defendant orally promised to pay plaintiff if he would go on and complete the bridges, which he did. Defendant refused to comply with his oral promise, and plaintiff brought assumpsit. The court held his oral promise to be binding, and stated the law to be that 'whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damages to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' The opinion further says: 'Nothing is better settled than the rule that, if there is a benefit to the defendant, and a loss to the plaintiff consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation.'"

In Clifford v. Luhring, 69 Ill. 401, where the defendant employed a party to build a house and on his failure the plaintiff, who was a sub-contractor, made known the fact to the defendant and informed him that he would be obliged to quit work, and the defendant thereupon told the plaintiff to go on with his part of the work and he would pay him, it was held: That the defendant's undertaking was not a collateral but an original one and was not within the Statute of Frauds, as assuming to answer for the contractor, his main object being to serve a purpose of his own. To same effect are Crawford v. Edison, 45 Ohio St. 239; Oldenburg v. Dorsey, 102 Md. 172, and a large number of cases cited in the note to Howell v. Harvey, 22 L. R. A., N. S. 1027. In Rusk v. Throop, 180 Ill. 127, it was said: "Whether or not the promise is original or collateral within the definitions already given, is a question to be determined by the jury from all the circumstances of the case and under the instructions of the court."

Ruggles v. Gatton, 50 Ill. 412.

We find no reversible error in the rulings of the Court on instructions or evidence or in the remarks of the Court made during the trial.

We think that from the evidence the jury might properly find that the promise of defendant Suffrin to the plaintiffs was a direct and original promise and therefore not within the Statute of Frauds.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

458 - 21856

PAULINE EHRHARDT, Appellee, vs. GEORGE E. EHRHARDT, Appellant.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

198 I.A. 47

Appellee, Pauline Ehrhardt, filed her bill for divorce against appellant and he filed a cross-bill against her. June 25, 1914, both bill and cross-bill were dismissed for want of equity, and the same day an order was entered that the defendant, appellant here, pay to complainant $108 on account of her solicitor's fees in the case. An order was entered commanding defendant to show cause why he should not be attached for contempt in failing to pay complainant $108 solicitor's fees, and on hearing of the rule April 12, 1915, defendant was adjudged guilty of contempt and an order entered that he be attached and confined in the county jail until he pay such solicitor's fees, but not exceeding six months. From that order this appeal is prosecuted by the defendant.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The Court had no authority at the conclusion of the case to order that the bill be dismissed for want of equity and at the same time order the defendant to pay to complainant solicitor's fees. The dismissal of the bill demonstrated that the suit of complainant was without foundation. The reason for the rule that required defendant to pay solicitor's fees to aid the wife to prosecute a meritorious case previous to the dismissal of her bill having ceased, that rule should no longer exist. Newman v. Newman, 69 Ill. 167.

In Chestnut v. Chestnut, 77 Ill. 346, it was held that the dismissal of the bill operated to revoke the order allowing temporary alimony. In that case it was said, p. 349:

"Such provision is for her immediate support and to enable her to meet the expenses of her defense pending the litigation. When the bill was dismissed, the husband's common law liability to support his wife was revived, and the necessity for alimony did not exist. It will be presumed he discharged his obligation in that regard; at all events, the liability remained, and it would be oppressive to impose upon him the payment of an additional sum deemed sufficient to support her if living separate and apart from him."

The order adjudging defendant guilty of contempt in failing to pay complainant $108 solicitor's fees and committing him to the county jail is reversed.

ORDER REVERSED.

564 -.21962

MAX STRICKER,
Appellee,

vs.

WILLIAM M. UMBENSTOCK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

198 I.A. 48

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The judgment in this case was rendered March 22, 1915. The time for filing the appeal bond was by orders properly entered extended "to and including June 1, 1915. The bond was not filed until June 2.

If the time within which an appeal bond is to be filed is fixed by statute, the requirement is mandatory and jurisdictional, and the court from which the appeal is taken has no power to extend the time. If the statute does not fix the time for filing an appeal bond, but requires the court to fix such time in its order allowing the appeal, the court may, prior to the expiration of the time so fixed, extend the time for filing the bond, and when the court fixes the time by extension or otherwise, if a bond is not filed within the time so fixed, the appeal must be dismissed; and this requirement being mandatory and jurisdictional, no motion to dismiss the appeal is necessary.

Hill v. Chicago, 218 Ill. 178.

APPEAL DISMISSED.

[illegible].

vs.

[illegible].

APPEAL FROM [illegible] DISTRICT
OF KING COUNTY.

1931 I.A. 48

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

The judgment in this case was rendered April 28, 1930. The time for filing the appeal bond was extended [illegible] to June 1, 1930. The bond was not filed until June 2.

If the time which must be fixed by statute, the requirement is mandatory and jurisdictional, and the court from which the appeal is taken has no power to extend the time. If the statute does not fix the time for filing an appeal bond, but requires the court to fix such time in its order directing the appeal, the court can, prior to the expiration of the time so fixed, extend the time for filing the bond, and then the court fixes the time by omission or otherwise, if a bond is not filed within the time so fixed, the appeal must be dismissed; and this requirement being mandatory and jurisdictional, no motion to dismiss the appeal is necessary.

State v. [illegible], 124 Ill. 194.

[illegible].

388 - 21786

CRYSTAL MINING PERCHERON HORSE AND CATTLE COMPANY, a corporation, and M. C. BLANCHETT,
Plaintiffs in Error,

vs.

FRED BECKLENBERG,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 49

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out by plaintiffs from a judgment of nil capiat entered on a verdict instructed by the trial Judge, on the motion of defendant, at the conclusion of so much of plaintiffs' case as the trial Judge admitted in proof.

The cause of action rests in a contract between the parties for the exchange of certain properties in Chicago and North Dakota. Plaintiffs seek to recover in this action damages for breach of the contract by defendant, by the terms of which contract defendant was to convey a flat building which he claimed to own in Chicago to plaintiffs, and as compensation therefor plaintiffs were to convey to defendant certain ranch property in North Dakota with cattle, farm machinery, etc., thereon. [The particulars of the terms of this contract are not material to be stated at this time, as in the conclusion at which we have arrived the cause must be returned to the Municipal Court for a new trial. Neither do we intend to pass upon all the facts involved in the record, but shall confine our references to such of them as impel our conclusion.]

Plaintiffs and defendant, within the time as extended for the performance of the contract and on November 6, 1913, furnished each other with abstracts of title to their respective properties. The abstract furnished by defendant

showed title in him November 4, 1913, to the Chicago property which he had agreed by the contract to convey to plaintiffs, subject to certain encumbrances. Plaintiffs likewise tendered deeds, etc., running to defendant, of their property to the holder of the contract in escrow at his office in Chicago, that being the place appointed in the contract for the passing of the papers and the completion of the transaction. What plaintiffs did in this regard they contend constituted a performance by them of their contract obligations so far as the attitude and conduct of defendant made performance possible.

On November 22, 1913, defendant conveyed to one Frank C. Rothje by warranty deed the property which he had contracted to convey to plaintiffs, which deed was thereafter and on November 24, 1913, filed for record and duly recorded in the Recorder's office of Cook County. Thereupon plaintiffs, without any other demand being made, commenced this action for damages claimed to have been sustained by them on account of defendant's breaching his contract with them, upon the theory that as defendant had put it out of his power by the conveyance to Rothje to carry out his part of the contract, the law gave them a right of immediate action for damages and absolved them from further performance of the contract, (which performance, but for defendant's dereliction, would have been incumbent upon them.) On the theory that plaintiffs were not absolved from doing all those things that the contract provided they should do, notwithstanding defendant had by his deed to Rothje put it out of his power to convey to them the Chicago property as contracted, the trial Judge rejected, on the objections of defendant, all the material evidence offered

by plaintiffs to establish their claim for damages.

We think, from the fact that defendant by his conveyance to Rothje had put it out of his power to perform his part of the contract, that defendant must, in legal effect, be held to have rescinded the contract and to have given the plaintiffs the right to so treat it, which they may be regarded as having done by the beginning of this action. As said in Hurd v. Denny, 16 Ill. 492, "The right of recovery is not put upon the mere fact of a neglect or refusal to convey, but it is shown, in addition, that plaintiff had rescinded the contract by selling the land to Stephens." Smith v. Hewt, 26 Ill. 547, Deiberling v. Lewis, 93 Ill. App. 549, Treat v. Smith, 139 Ibid. 426, Newcomb v. Brackett, 16 Mass. 161, Lewe v. Harwood, 139 Ibid. 133, and Osgood v. Skinner, 211 Ill. 229, are supporting authorities on this point. The trial Court therefore committed reversible error in excluding the proofs offered by plaintiffs and in instructing the jury to find a verdict against them.

The measure of damages plaintiffs are entitled to recover is, under the rule laid down in Plumer v. Higdon, 78 Ill. 222, the difference, if any there be, between the value of the property agreed to be conveyed by them to defendant and that which defendant agreed to convey to them. Defendant argues that at most the plaintiffs are entitled to recover but nominal damages. However, from the evidence on this question found in the record, it would seem that plaintiffs have at least laid a foundation for substantial damages, which, if likewise successful on a retrial, is sufficient to call for evidence on the part of defendant to rebut. We do not intend, however, to be understood as passing upon or settling that question. Our reference to it is simply for

the purpose of disposing of the point made by defendant that this Court would not reverse if it conclusively appeared from the record that plaintiffs could recover but nominal damages.

The judgment of the Municipal Court is, for the reasons advanced in this opinion, reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

431 - 21829

JANET S. WINTERS,
Appellee,

vs.

THE AURORA, ELGIN AND CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL SUPERIOR COURT OF COOK COUNTY.

198 I.A. 52

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court for $7500 in favor of plaintiff and against defendant, founded upon the verdict of a jury in an action for personal injuries.

The declaration, consisting of one count, charges as negligence defendant's failure to remove a certain door or covering from over the steps of the car on which plaintiff was a passenger, and carelessly, negligently and improperly permitting the door or covering to remain upon the platform of said car and upon and over the steps thereof, rendering the same dangerous and hazardous as to the plaintiff, and carelessly and negligently failing to notify and warn plaintiff as to the condition and position of said door or covering over said steps and the dangers incident thereto; that plaintiff, in consequence of such negligence, while in the exercise of ordinary care, and during the night time when it was dark, and while attempting to leave said car, under the direction of defendant's servant, stepped from and off the door or covering of said steps, instead of stepping down to and upon the steps and from said steps down to and upon the ground, causing plaintiff to fall and to be precipitated a great distance from said car down to and upon the ground, injuring her, etc.

JAMES E. [illegible],
Appellee,

vs.

THE AURORA, ELGIN AND CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL. APPELLATE COURT OF COOK COUNTY.

195 I.A. 52

MR. JUSTICE MORROW DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court for $7500 in favor of plaintiff and against defendant, founded upon the verdict of a jury in an action for personal injuries.

The declaration, consisting of one count, charges as negligence defendant's failure to remove a certain door or covering from over the steps of the car on which plaintiff was a passenger, and carelessly, negligently and improperly permitting the door or covering to remain upon the platform of said car and upon and over the steps thereof, rendering the same dangerous and hazardous as to the plaintiff, and carelessly and negligently failing to notify and warn plaintiff as to the condition and position of said door or covering over said steps and the dangers incident thereto; that plaintiff, in consequence of such negligence, while in the exercise of ordinary care, and during the night time when it was dark, and while attempting to leave said car, under the direction of defendant's servant, stepped from and off the door or covering of said steps, instead of stepping down to and upon the steps and from said steps down to and upon the ground, causing plaintiff to fall and to be precipitated a great distance from said car down to and upon the ground, injuring her, etc.

On the day of the accident to plaintiff she had been with her sister-in-law, a Mrs. Yarger, to the cemetery where her mother was buried, and in returning to her home took defendant's car at Bellwood with the intention of leaving it at Des Plaines avenue, Forest Park, and from there taking a Metropolitan elevated train to Central avenue station on that road, that being the nearest station to her home, 332 North Taylor avenue, Oak Park.

It is not denied that defendant's car platforms were equipped with flaps, which let down from the steps and were kept down while the cars were in motion. At stations where defendant maintained elevated platforms, passengers got off the cars on a level, without the raising of the flaps from the steps. Where station platforms were upon the ground the flaps were raised so that passenger alighted by walking down the steps, which ran downward to the station platform.

At the time of the accident the car had stopped at the Des Plaines avenue station, Forest Park, and remained stationary until after the accident. Plaintiff, who was seated in the car, came out of the car onto the platform. When she reached the platform Mrs. Yarger followed and stood back of her. Plaintiff then took hold of a perpendicular rod with her left hand and took hold of another part of the car with her right hand. Plaintiff testified that it was dark and that she stepped off of the car expecting to step on a step leading from the car platform, but as there was no step there, she fell.

It is assigned and argued as error that the "verdict is against the clear preponderance of the evidence," and while there are other errors which we think are well assigned, we shall rest our decision on the second as-

On the day of the accident to plaintiff she had been with her sister-in-law, a Mrs. Yarger, to the cemetery where her mother was buried, and in returning to her home took defendant's car at Hollywood with the intention of leaving it at Des Plaines avenue, Forest Park, and from there taking a Metropolitan elevated train to Central avenue station on that road, that being the nearest station to her home, 332 North Taylor avenue, Oak Park.

It is not denied that defendant's car platforms were equipped with flaps, which let down from the steps and were kept down while the cars were in motion. At stations where defendant maintained elevated platforms, passengers got off the cars on a level, without the raising of the flaps from the steps. Where station platforms were upon the ground the flaps were raised so that passenger alighted by walking down the steps, which ran downward to the station platform.

At the time of the accident the car had stopped at the Des Plaines avenue station, Forest Park, and remained stationary until after the accident. Plaintiff, who was seated in the car, came out of the car onto the platform. When she reached the platform Mrs. Yarger followed and stood back of her. Plaintiff then took hold of a perpendicular rod with her left hand and took hold of another part of the car with her right hand. Plaintiff testified that it was dark and that she stepped off of the car expecting to step on a step leading from the car platform, but as there was no step there, she fell.

It is assigned and argued as error that the "verdict is against the clear preponderance of the evidence," and while there are other errors which we think are well assigned, we shall rest our decision on the second as-

signment of error. However, there are errors in the rulings on evidence and on instructions, and some of the questions of counsel for plaintiff put to Dr. Pickard on cross-examination were highly improper, entirely uncalled for, and tended to unwarrantably prejudice Dr. Pickard in the eyes of the jury and to, in a measure, destroy the effect of his evidence. The questions, "How long have you been the quasi investigator physician and doctor for this road?" and "Just let them walk out there like cattle?" and the reference to the defendant as the doctor's "boss" were entirely uncalled for, as were questions of similarly insinuating character, the effect of which we could not say - if it were necessary to determine the question - was negatived by the terse ruling of the court without comment as to the impropriety of such questions.

All the evidence in the record considered, we are unable to find from its preponderating force that defendant was guilty of the negligence charged against it as being the primary cause of plaintiff's fall from the car and the resulting injuries to her. On the contrary, the evidence overwhelmingly preponderates in favor of the contention of defendant that plaintiff was not in the exercise of due care for her own safety at the time she was injured. We cannot from the evidence regard it as a disputed fact that plaintiff knew the condition of the platform at the time she stood upon it and was conscious of the fact that the flap over the steps had not been pulled up; and while plaintiff charges in her declaration that it was dark upon the platform at the time of the accident to her, yet all the evidence on the subject of light considered, we can hardly say therefrom that it is a disputed fact that the light was amply sufficient to enable plaintiff, in

judgment of error. However, there are errors in the rulings on evidence and on instructions, and some of the questions of counsel for plaintiff put to Dr. Pickard on cross-examination were highly improper, strictly unmalled for, and tended to unwarrantably prejudice Dr. Pickard in the eyes of the jury and to, in a measure, destroy the effect of his evidence. The questions, "How long have you been the quasi investigator physician and doctor for this road?" and "Just let them walk out there like cattle?" and the reference to the defendant as the doctor's "boss" were entirely uncalled for, as were questions of similarly insinuating character, the effect of which we could not say - if it were necessary to determine the question - was neutralized by the terse ruling of the court without comment as to the impropriety of such questions.

All the evidence in the record considered, we are unable to find from its preponderating force that defendant was guilty of the negligence charged against it as being the primary cause of plaintiff's fall from the car and the resulting injuries to her. On the contrary, the evidence overwhelmingly preponderates in favor of the contention of defendant that plaintiff was not in the exercise of due care for her own safety at the time she was injured. We cannot from the evidence report it as a disputed fact that plaintiff knew the condition of the platform at the time she stood upon it and was conscious of the fact that the flap over the steps had not been pulled up; and while plaintiff charges in her declaration that it was dark upon the platform at the time of the accident to her, yet all the evidence on the subject of light concluded, we can hardly say therefore that it is a disputed fact that the light was amply sufficient to enable plaintiff, in

the exercise of ordinary care, to become aware that the flap over the steps had not been raised. Plaintiff herself testified that "it was sufficiently light so that I saw plainly that the vestibule door was open and I know the flap was down over the steps when we started to get off," and that she looked down for the express purpose of seeing where she was walking.

Plaintiff was also well aware of the construction of the platform of the car, that the steps were covered with a flap, that on station platforms which were at a level with the car platform the flap was left down, and that on grounded platforms the flap was raised and the steps used by passengers to alight. She herself testified, "I knew that the first step down would be some little distance inside the sheathing of the car. I kept that in mind." Also, "I knew the flap was down over the steps when we started to get off."

Plaintiff had many times travelled upon defendant's car between Bellwood and Des Plaines avenue station, Forest Park, and was perfectly cognizant of the construction of the car platform and of the station platforms at both of these stations. The fact that it was the duty of defendant's servant to raise the flap on the platform at Des Plaines avenue station to enable passengers to alight with safety, did not excuse plaintiff, on the failure of defendant's servant to raise the flap, from the negligence imputable to her in attempting to alight from the car without the flap being raised. In this condition it was the duty of plaintiff to wait until the flap had been raised before attempting to alight.

In determining the probative force of the evidence we cannot lose sight of the fact that in many material particulars plaintiff's evidence is contradicted by credible and disinterested witnesses. While plaintiff testified that

the exercise of ordinary care, I become aware that the flag over the steps had not been raised." Plaintiff Horsell testified that "it was sufficiently light so that I saw plainly that the vestibule door was open and I know the flag was down over the steps when we started to get off," and that she looked down for the express purpose of seeing where she was walking.

Plaintiff was also well aware of the construction of the platform of the car, that the steps were covered with a flap, that on station platforms which were at a level with the car platform the flap was left down, and that on raised platforms the flap was raised and the steps used by passengers to alight. She further testified, "I knew that the first step down would be some little distance inside the threshing of the car. I knew that in mind." Also, "I knew the flap was down over the steps when we started to get off."

Plaintiff had many times traveled upon defendant's car between Hollywood and the Alpine avenue station, Forest Park, and was perfectly cognizant of the construction of the car platform and of the station platforms at both of these stations. The fact that it was the duty of defendant's servant to raise the flap on the platform at the Alpine avenue station to enable passengers to alight with safety, did not excuse plaintiff, on the failure of defendant's servant to raise the flap, from the negligence imputable to her in attempting to alight from the car without the flap being raised. In this condition it was the duty of plaintiff to wait until the flap had been raised before attempting to alight.

In determining the probative force of the evidence we cannot lose sight of the fact that in many material particulars plaintiff's evidence is contradicted by credible and disinterested witnesses. While plaintiff testified that

she stepped off the car, she told Mrs. Morrow and Dr. Pickard that she "was pushed off the train." Dr. Pickard produced a statement signed by plaintiff to that effect, and although she claims that the paper she signed was in blank at the time she signed it, the quantum of proof on this point is against such claim.

She also testified that it was dark upon the platform at the time of the accident. Her sister-in-law, Mrs. Yarger, testified that it was sufficiently light so that she could plainly see that the vestibule door was open. Several witnesses testified as to the abundance of light, both on the platform of the car and around Des Plaines avenue. In the testimony of some of the witnesses, lights are specifically mentioned as follows: About twenty-five feet from the station platform was the entrance archway of Forest Park, on which were seven clusters of 60-watt forty candle-power tungsten lamps with five lights in each cluster, which threw 1400 candle-power of brilliant tungsten illumination directly onto defendant's train, the vestibule door and the platform from which plaintiff alighted; lights in the tower of Forest Park, about fifteen feet removed from the station platform, and an arc lamp on a pole thirty-five feet high just inside the entrance to Forest Park, with a lighting power of 3500 candles; two street electric lights within fifty and one hundred feet of defendant's track; four clusters of incandescent lights of five lights each on the crossing gates, and a cluster of lights on the watchman's shanty immediately west of Des Plaines avenue; a cluster of lights on a pole on the east side of Des Plaines avenue; also tungsten and gas arcs on the front porch of a fruit store just south of defendant's tracks; all of which were

she stepped off the car, she told Mrs. Morrow and Mr. Hickard that "she was pushed off the train." Mr. Hickard produced a statement signed by plaintiff to that effect, and although she claims that the paper she signed was in blank at the time she signed it, the quantum of proof on this point is against such claim.

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burning at the time of the accident.

Plaintiff testified that she was carried after the accident, which disinterested witnesses contradict by testifying that she walked. Plaintiff also attributed the ailments from which she was suffering to injuries received as the result of her fall from defendant's car, while it is clearly proven that all of the important physical ailments of which she complained existed prior to her fall from defendant's car. She also testified that after the accident she was an invalid and unable to do her own work. We think this testimony was successfully rebutted by the testimony of credible and disinterested witnesses.

Whether plaintiff fell from or was pushed off the platform of defendant's car, does not tend, under the circumstances established by a preponderance of the evidence, to prove defendant guilty of the negligence charged against it in the declaration. The negligence which was the primary cause of the accident is attirbutable to plaintiff in failing to use that prudence incumbent upon her under the conditions environing her at the time of the accident. Her want of prudence is such contributory negligence on her part, as a matter of fact, as precludes a recovery. Davenport v. Calumet and South Chicago Railway Co., General No. 21348, not yet reported; McAvoy v. St. Louis etc. R. R., 150 Ill. App. 620.

The power vested in this Court by virtue of Section 87 of the Practice Act, includes the power, upon appeal from a judgment of the trial court, to reverse such judgment without remanding the cause upon the ground that the weight of the evidence does not authorize the verdict. Borg v. C.R. I. & P. Ry. Co., 162 Ill. 348; C. C. C. & St. L. Ry. Co. v. Alfred, 123 Ill. App. 477; Casper v. I. C. R. R. Co., 162 ibid 104; Poliakoff v. Chicago Railways Co., 162 ibid 632.

burning at the time of the accident.

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Whether plaintiff fell from or was pushed off the platform of defendant's car, does not tend, under the circumstances established by a preponderance of the evidence, to prove defendant guilty of the negligence charged against it in the declaration. The negligence which was the primary cause of the accident is attributable to plaintiff in failing to use that prudence incumbent upon her under the conditions surrounding her at the time of the accident. Her want of prudence is such contributory negligence on her part, as a matter of fact, as precludes a recovery. Davenport v. Calumet and South Chicago Railway Co., (General No. 21326, not yet reported; McAvoy v. St. Louis etc. R. R., 161 Ill. App. 630.

The power vested in this court by virtue of section 87 of the Practice Act, includes the power, upon appeal from a judgment of the trial court, to reverse such judgment without remanding the cause upon the ground that the weight of the evidence does not authorize the verdict. Horn v. C.R. I. & P. Ry. Co., 162 Ill. 568; C. C. C. & St. L. Ry. Co. v. Allred, 152 Ill. App. 477; Cooper v. I. C. R. R. Co., 162 ibid 104; Bolinoff v. Chicago Railways Co., 162 ibid 632.

We are unhesitatingly impelled to the conclusion that the weight of the evidence did not authorize the verdict against defendant, and that the judgment should be reversed with a finding of fact, which is accordingly done.

REVERSED WITH FINDING OF FACT.

431 - 21889 FINDING OF FACT.

The Court finds, as matter of fact, that the injuries of plaintiff were occasioned by her own carelessness and not by any negligence of the defendant.

We are unhesitatingly impelled to the conclusion that the weight of the evidence did not authorize the verdict against defendant, and that the judgment should be reversed with a finding of fact, which is accordingly done.

REVERSED WITH FINDING OF FACT.

431 - SLEEP FINDING OF FACT.

The Court finds, as matter of fact, that the injuries of plaintiff were occasioned by her own carelessness and not by any negligence of the defendant.

462 - 21860

HENRY REINSHAUSEN et al.,
Appellees,

vs.

LOUIS C. ALTER et al.,
On Appeal of WALTER D. BRAUEN,

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

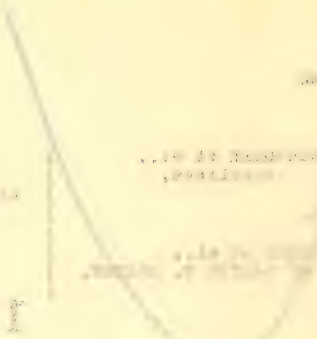
193 I.A. 56

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure in which the mortgaged property is ordered to be sold to satisfy the amount found due by the master's report, and appellant seeks a reversal of that decree.

The trust deed foreclosed was given to secure the principal sum of $1500 and interest, payable half yearly, the interest being evidenced by coupon interest notes of $45 each. Two of these notes matured and were not paid at the time the bill was filed. The mortgaged property had before this time been sold for taxes and the certificate of sale was outstanding, uncancelled and unreleased, at the time the bill was filed. The trust deed contained a covenant authorizing the legal holder of the indebtedness to declare due the whole amount unpaid upon default in payment of any interest coupon for thirty days, or in the event of failure to pay taxes on the mortgaged premises when due. Advantaging of these provisions, appellees declared the whole sum due by reason of the non-payment of the two interest coupons and the non-payment of taxes and the sale of the mortgaged premises by reason of such non-payment.

Appellant confesses and endeavors by his answer to avoid the legal consequences of these facts. He contends that his agent paid these interest coupons at the place where they were payable; that the person to whom the interest was



paid delivered to appellant's agent two coupon interest notes for $45 each, duly cancelled. It transpired that these coupon interest notes did not relate to the mortgaged property, but to other property near by, which was mortgaged by another trust deed to the same trustee and was of like tenor, date and amount as that secured by the trust deed foreclosed. There were many other such trust deeds in many essential particulars the same as that found in the bill in the record, but covering other, though contiguous, property. There seems to have been some negligence on the part of the agent of appellant in paying two coupons due under a trust deed covering property other than that secured by the trust deed in this record, although appellees deny this. However, be this as it may, if the agent of appellant did pay other notes by inadvertence, and did not pay those notes which appellant claims he intended his agent to pay, such mistake must be attributed to appellant. If appellant has voluntarily paid some coupons other than his own, he must suffer the consequences of such action. The law will not allow him to foist the responsibility upon appellees, who in no wise are responsible for the predicament in which appellant finds himself as the result of the actions of his agent. When the bill was filed the two coupon notes had remained unpaid for more than thirty days after their maturity. This condition permitted appellees to declare the whole amount secured by the trust deed due and payable and to proceed to foreclose the trust deed according to its provisions in this regard. It was the duty of the agent of appellant to see to it when he made the payment he did that he received in return the coupons which he intended to pay and not others. Whatever appellant's intentions regarding payment were, his agent received the coupons which he in fact paid.

Appellant admits the sale of the mortgaged

property for taxes. To avoid the effect of such sale as violative of the covenants of the trust deed requiring prompt payment of taxes, etc., he contends that he has and owns the certificate of sale. This condition in no way redounds to the benefit of appellant or changes the fact that the mortgaged property was sold for non-payment of taxes.

The purpose intended, in requiring taxes to be paid promptly, is to avoid a sale of the mortgaged property for non-payment and to preserve the paramount lien of the trust deed. The certificate of sale was a cloud and lien upon the property conveyed superior to the lien of the trust deed foreclosed. If appellant sees fit to contravene the covenant of the trust deed in this regard by failing to pay the taxes when due and allowing the mortgaged property to be sold for such non-payment, he must suffer the consequences of his dereliction. It would be inequitable to hold otherwise. Gray v. Robertson, 174 Ill. 342, and Brockway v. McClun, 148 Ill. App. 465, are authorities sustaining this conclusion.

The decree of the Circuit Court is right and is therefore affirmed.

AFFIRMED.

specifically for homes. To avoid the effect of such sale as violative of the provisions of the first land ordinance prior to issuance of patent, we, in conscience that he was not given the certificate of sale. This condition is no way contrary to the benefit of applicant or denied the fact that the contracted directly was sold for non-payment of taxes.

The Supreme Tribunal, in reversing, makes no jots precisely, as to avoid a sale of the contracted property for non-payment and so increase the government item of the first deed. The certificate of sale was a clouds and item upon the property contracted subject to the lien of the first deed determined. If applicant does fit to contravene the provisions of the first deed in this regard by failing to pay the taxes due and allowing the mortgagee property to be sold for such non-payment, he thus nullify the consummation of the detaile-tion. It would be impossible to sale otherwise. Cf. v. Lerenzen, 19: (:. 0:), and Trucksess v. Bucklin, 18 Ill. App. 47, are substantiate supplanting this conclusion.

The course of the Circuit Court is right and is therefore affirmed.

AFFIRMED.

530 - 21928

GEORGE J. SAYER,
Appellee,

vs.

ANDREW J. O'CONNELL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

193 I.A. 64

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The Municipal Court entered a judgment by confession for rent and attorney's fees, under a power contained in a lease set forth in the statement of claim, in favor of plaintiff and against defendant for the sum of $1181. Defendant afterwards made a motion to vacate the judgment on the single contention and claim that the Court had no jurisdiction to enter it. No affidavits were filed in support of this motion and no claim made of meritorious defense to the amount of the judgment or any part of it.

Defendant grounded his motion upon the fact that in the statement of claim it is recited that the lease containing the power of attorney authorizing the confession of judgment was lost or mislaid. This contention is true, but it appeared by an averment in the statement of claim that a sworn copy was filed in its place; this fact is not denied by defendant. It is further set forth in the statement of claim that the copy of the lease attached to such statement had been admitted by defendant in another action between the same parties to be an exact duplicate of the original lease; and it was also admitted by defendant that the original lease was executed by him. Plaintiff also averred in his statement of claim that the said lease had never been assigned or transferred to any other person. The trial judge denied the motion to vacate, and defendant appeals.

It appears that the judgment appealed from was entered in open court. Consequently, all presumptions in favor of its validity must be indulged. Farwell v. Huston, 151 Ill. 246, is directly in point. In this case the Court say:

> "It was also held * * that there is a broad distinction between cases wherein the proceedings are had in open court, and cases where the judgment is confessed in vacation; that, in the latter case, the authority of the attorney must affirmatively appear, while in the former case the presumption will be in favor of the validity of the judgment."

The original lease being lost or misplaid, the sworn copy proffered to the court in its place was sufficient evidence from which the court was authorized to enter the judgment appealed from. Especially is this so in view of defendant's admission that it was a true copy. We think it clear from plaintiff's statement of claim that the Municipal Court had jurisdiction to enter the judgment which it did.

While many other questions are argued by counsel for both contestants, the question raised in the Court below was limited to the jurisdiction of the court; consequently no other reason is available on appeal.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

404 - 26544

ROYAL COLLIERY COMPANY, a Corporation, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
ALWART BROS. COAL COMPANY, a Corporation, Appellant.	)	OF CHICAGO.

198 I.A. 67

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

This is an appeal from a judgment for $1155.00, rendered in a suit brought by appellee (plaintiff below) against appellant, (defendant below) for the value of certain washed coal sold by plaintiff to defendant.

The statement of claim sets forth in detail the various months during which washed coal was purchased, the delivery thereof, the time when payments were due under the agreement between the parties and the exact amount due. It also set forth a claim for interest at the rate of five per cent. per annum, for failure on the part of defendant to pay said amount when due.

Plaintiff was in the business of mining and shipping coal, having its mines at Virden, Illinois. Defendant was a coal dealer in the city of Chicago, and had a contract with the board of education to supply part of the coal used in the Chicago public schools. On the 28th day of July, 1911, plaintiff and defendant entered into a written contract whereby plaintiff agreed to sell, and defendant agreed to buy, approximately

20,000 tons of lump and egg coal at a price of $1.07½ per ton at the mines; said coal to be shipped in approximately equal quantities (about 2500 tons per month) between the date of the contract and March 31, 1912, as ordered, and payments to be made at Virden on the 20th of each calendar month for 50% of all coal shipped during the previous month; the balance to be paid for on the 10th of the second month following shipment.

In January, 1912 there arose between the parties some difficulty with reference to this contract, [to which more detailed reference will be had later in the course of this opinion.] During the period that the school coal contract had to run, defendant needed certain coal known as "washed coal"; however, the transaction for washed coal was to be considered separate and apart from the transactions involving the school coal contract. It was also understood that payment for the washed coal was to be made on the 10th of the month following shipment.

The evidence is undisputed that there was furnished by plaintiff to defendant washed coal as set forth in its statement of claim, amounting to $1485.37, and that the coal represented by the first item was delivered on February 20, 1912.

During January, 1912, there was delivered to defendant on the school coal contract, coal valued at $1317.08. Under the terms of the school coal contract, there was due on February 20 the sum of $908.54. There was also due at this time $268.11 for washed coal delivered in January.

On February 20 defendant sent plaintiff a voucher check for $1100.00, which voucher check stated that it was a payment "on account." This check was received by plaintiff and was paid in due course.

On June 15, 1912, defendant sent a voucher check to the plaintiff for the sum of $376.40. This voucher check had on its back the following memoranda:

"3/26	Bill rend.		$1209.72	
3/ 7	" "		121.66	
2/20	" "		153.99	
			1485.37	
1911		Cr.		
10/5	Cr. memo. 139 -	4.49		
26	Cr. memo. 144 -	13.92		
			18.41	
				1503.78
1911				
11/3	Cash		27.38	
1912				
2/21	Cash		1100.00	
				1127.38
				376.40"

This check was received and deposited by plaintiff and paid. It will be seen that the defendant in the voucher check applied the $1100 payment of February 20 on the washed coal account.

It further appears from the evidence that after the beginning of this suit, plaintiff, on October 15, 1912, began an action against the defendant in the United States district court, in which suit plaintiff filed the ordinary common counts, alleging damages in the sum of $5000.00.

Defendant pleades the general issue. That suit arose out of a controversy with reference to the school coal contract. After suit was begun in the United States district court by plaintiff, defendant began an action in the Municipal court of Chicago to recover damages which it claimed to have sustained because of plaintiff's failure to fulfill the school coal contract. This cause was removed to the United States district court and the two cases were tried together.

Defendant claims that in the trial of these two cases in the United States district court, plaintiff admitted that the $1100.00 paid on February 20 was applied on the washed coal account and not on the school coal contract; that according to plaintiff's accounts, there submitted in evidence, the $1100.00 payment was not applied by plaintiff on the school coal contract; that all the coal ordered and delivered previously to January had been paid for; that no coal was ordered under the school coal contract after February 20, and therefore plaintiff in that case was suing for only the coal ordered and sold during the months of January and February; that there was due for said coal not to exceed $3523.00; that there was proven in that case damages not to exceed $1200.00; that the interest due on any theory of the case could not have been more than $175.00; making a total of $4898.00; that therefore the verdict for $5021.95 rendered in the United States district court proceeding could have been arrived at only on the theory that the $1100.00 payment in question had not been applied on the school coal contract; that the judgment entered on said verdict was res adjudicata of that fact; that with the elimination of that

question here, there was no further issue to be determined, consequently plaintiff had no cause of action, as the payment of $1100.00 and the check for $376.40 constituted full payment of the amount due for washed coal, the subject matter of the present suit.

Plaintiff contends, however, that its suit in the United States district court was not for the value of said coal at the contract price, but for the market value thereof, together with damages for defendant's failure to order coal in quantities provided for in the school coal contract, during the months prior to January; that it based its right to a recovery for damages upon an alleged breach of the contract by defendant; that the $1100.00 payment was applied by it on the school coal contract, and that the jury in the United States district court proceeding so found.

In support of their reppective contentions, both parties introduced testimony as to the proceedings in the United States district court, not only as to the evidence there offered, but also the rulings of the court thereon, the pleadings and the instructions to the jury. This testimony was given by the respective attorneys who represented the parties in the litigation both in the United States district court and in the proceeding at bar.

It appears from the evidence that the testimony in the proceeding in the United States district court showed that up to February 20 about 7500 tons of coal had been delivered to defendant under the school coal contract, 3262.02 tons of which were furnished between January 12 and Fenruary 20; that on February 20 defendant demanded that the balance of the coal due under the school coal contract

COURT

(12,500 tons) to be delivered during the remainder of the contract period viz., by April 1; that upon plaintiff's refusal to comply therewith, defendant declined to order any more coal from plaintiff; that plaintiff claimed that the failure to order coal as provided for under the contract, at the rate of 2500 tons per month, constituted a breach of the contract, by reason of which breach plaintiff had the right to recover any damages suffered as a result thereof, also for the coal delivered during January and February, on the basis of the market value, and not upon the contract price.

The evidence further showed that in the course of the trial in the United States district court it appeared that after this contract had been entered into, the price of coal declined to a figure below the price therein provided for, during the months of August, September and October; that during said period, defendant's orders fell considerably below the monthly quota; that during November, when the price of coal rose above the contract price, defendant ordered 2000 tons - nearly the full quota; that during December, when the price again declined, defendant ordered only 1000 tons; that during January and February, 1912, when the weather became cold, the price of coal advanced sharply; that because of defendant's failure to order coal as contracted for, plaintiff had made certain contracts with other people, so that when defendant ordered in larger quantities in January, the plaintiff, by reason of these emergency contracts, was unable to commence deliveries to defendant until January 12; that

(If,Sec.1,Ins) 1) In [illegible] during the continuance of the contract period viz., in April 1; that upon plaintiff's refusal to supply [illegible], defendant sued to enjoin the [illegible]; defendant claims to have the failure to take and to withdraw the water the [illegible] of the contract, by reason of this breach plaintiff had the right to recover, and damages suffered as a result thereof, also for the not delivering during January and February, on the basis of the market value, and not upon the contract price.

The trial court [illegible] ruled that if the course of the trade in the United States district court it appeared that after this contract had been entered into, the price of coal declined to a figure below the price therein provided for, during the course of August, September and for per; and during each period, defendant's orders fell considerably below the monthly quota; that during November, when the price of coal rose above the contract price, [illegible] - namely the full quota; that during December, when the price [illegible] declined, defendant ordered only 1/4 ton; that during January and February, 1918, when the weather became cold, the price of coal advances sharply; that because of defendant's failure to order coal as contracted for, plaintiff had made certain contracts with other people, so that when deliveries ceased to larger quantities in January, the plaintiff, by reason of the movement contracts, was unable to procure [illegible] (full amount in) [illegible]

the amount of coal delivered from January 12 to February 20 was practically on a basis of 2500 tons per month.

It appeared further from the evidence in the case at bar, that in the suit in the United States district court, defendant's statement of claim in the Municipal court of Chicago was introduced, showing the market price of coal during January and February was $2.00 and $1.75 per ton, respectively; that plaintiff introduced evidence showing the market price day by day; that defendant claimed the market price of coal during January and February ranged as follows:

January	10 to 16	- - - -	$2.25	per ton
do	16 25	- - - -	1.75	
do	25 31	- - - -	1.78	
Feby.	2 & 3	- - - -	1.90	
do	4 to 9	- - - -	1.65	
do	10 19	- - - -	1.95	
do	19 & 20	- - - -	1.60	

It further appeared that in the United States district court Paul J. Alwart, secretary of the defendant company, testified that the payment of $1100.00 was originally intended as payment of the $908.54 due February 20 for January coal deliveries under the school coal contract, and an item of $269.11 due for washed coal, but that later, viz., in June, he applied the entire amount in payment of the sum due for washed coal, and that plaintiff acquiesced in such action. It further appears that defendant based its claim for the application of the $1100.00 on the washed coal account, upon the fact that the voucher check for $376.40 showed that the $1100.00 was applied by defendant to the payment of all washed coal. This was also testified to by Mr. Alwart in the case at bar.

It further appeared that in the United States district court proceeding there was evidence that the washed coal account was separate from the school coal contract, and

the course of oral evidence from January 21 to February 26 was practically a waste of 21 hour per week.

It appears further that the witness in the case, if any, that it has been as the Sales Tax Act which shows, differentiate statement of claim in the Exchequer Court of Canada was instituted, namely, the amount plus of oral during January and February was $2,[illegible] and $3,70 per ton, respectively; that liability indicated within. During the course of the day by day; the witnesses claims the better part of oral during January and February was changed as follows:

January 21 to 27	- - - -	[illegible] per ton
28	31	- - - -	1,[illegible]
29	28	- - - -	1,[illegible]
Feby.	2	- - - -	1,[illegible]
4	10	- - - -	1,[illegible]
5	17	- - - -	1,[illegible]
6	18	- - - -	1,[illegible]

It further appeared that in the Taxing Bureau district court that C. Lamont, secretary of the Exchequer company, testified that the payment of $[illegible] was originally intended as payment of the $[illegible] due February 20 for January and February which is almost and continued, and an item of $[illegible] for January and, but that later, viz., in June, he qualified the entire amount to payment of the amount due for January and, and that finally requested in such action. It further appears that interest based for claim for the application of the $[illegible], or as the amount and account [illegible] that the working capital for $[illegible] allowed that the $[illegible] was applied by defendant in the payment of all months and. This may also be verified on by Mr. Howes in the same at that.

It further appeared that in the Taxing Bureau district court particularly was evidence that the amount and account was begun from the actual and [illegible], and

that plaintiff and defendant had agreed that the washed coal account be taken care of independently of any difficulties arising with reference to the school coal contract; that A. J. Maloney, vice president of the plaintiff company, testified that the $1100.00 was applied on the amount due for coal delivered in January on the school coal contract, and on the washed coal delivered in January; that afterwards (in May) the defendant, by separate check, paid for the washed coal delivered during January, whereupon the entire sum of $1100.00 was applied on the amount due on the school coal contract. It further appeared that in the United States district court proceeding, the question whether or not the contract had been breached was one of fact, and that the jury were instructed that if they believed from the evidence, that the contract had been breached, plaintiff might recover the market value of the coal sued for.

On this state of the record, defendant contends: first, that its voucher check for $376.40 was tendered to plaintiff as a payment in full for the washed coal in question. This contention is based upon the fact that the voucher check contained on the back of the memoranda which we have already set forth; that plaintiff, by accepting this check acquiesced in the application of the $1100.00 to the payment of the amount due on the washed coal account; that in fact, the giving of this voucher check and the acceptance thereof constituted an agreement on the part of plaintiff to accept this check in full for the washed coal. And counsel for defendant argues that under the facts, the court should have held as a matter of law that

[illegible] contended that the wedded [illegible] plaintiff's [illegible] of any difficulties arising with reference to the marital [illegible] meaning; that a [illegible] marriage, also provisions of the [illegible] statutes, including that in Illinois, it was [illegible] in the [illegible] that delivered in January on the [illegible] and [illegible] delivered in January; that otherwise (in any) the defendant, by appropriate [illegible], paid for the wedded [illegible] delivered during January, [illegible] the [illegible] $[illegible] on the amount due on the wedded [illegible] contract. It further appears that in the United States district court proceeding, the question whether or not the [illegible] had been breached was in fact, and that the jury was instructed that if they believed from the evidence, that the [illegible] was breached, plaintiff might recover the [illegible] of the [illegible] [illegible].

In this stage of the [illegible], defendants argument: first, that its [illegible] for $[illegible] was tendered to plaintiff as a payment in full for the wedded [illegible] in question. This contention is based upon the fact that the [illegible] contained in the [illegible] - the memorandum which we have already set forth; that plaintiff, by accepting [illegible] the amount due on the wedded [illegible] account; that in fact, the giving of this [illegible] check and the acceptance thereof constituted an agreement on the part of plaintiff to accept this check in full for the wedded [illegible]. The [illegible] for defendant argues that under the facts, the parties have been held as a matter of law that

this constituted a contract. In this contention we cannot concur.

It appeared from the evidence, that during January plaintiff delivered to defendant coal valued at $1817.08. Under the terms of the school coal contract, one-half of this became due February 20. This was due when the $1100.00 check was sent. There was also due at that time for washed coal delivered during the month of January, the sum of $268.11. The evidence in the case shows that plaintiff at this time applied the $1100.00 to the payment of these two items. The item of $268.11, however, was afterwards paid by separate check of the defendant, and thereupon plaintiff credited the entire $1100.00 on the amount due under the school coal contract. According to Alwart's testimony, the $1100.00 was sent on February 20 in order to protect defendant's rights under the contract, some difficulty having arisen between the parties with regard thereto. On this very day (February 20) defendant demanded of plaintiff the delivery by April 1, of the entire balance due under the school coal contract (12,500 tons) of coal. Clearly, therefore, at the time this $1100.00 payment was made, defendant must have intended that it should be applied on the school coal contract, in order to justify its demand for the 12,500 tons under the contract. This is evidenced further by the fact that February 20, the date of the payment, was the date when the first item of the account sued for in this case was purchased, and this item did not become due until March 10.

The first intimation that any claim was made by defendant that this payment of $1100.00 should be applied

[illegible] a minimum. In this instance we cannot [illegible].

If [illegible] from the evidence, that during January [illegible] delivered to defendant coal valued at $[illegible]. Much the bulk of the school coal contract, amounting to [illegible] from Feb[illegible] 26. This was the [illegible] the [illegible] coal was sold. There was also an at time for which [illegible] during the month of January, the sum of $[illegible]. The evidence in the case shows that plaintiff at its [illegible] the [illegible] of [illegible] the items. The item of $[illegible], however, [illegible] which is [illegible] plaintiff [illegible] defendant coal contract. According to [illegible] testimony, the [illegible] to produce determinate facts in order [illegible] difficulty having arisen between the parties it is regard [illegible]. In this way, our [illegible] defendant demanded of plaintiff the delivery of [illegible] 1, of the entire balance due under the school coal contract (24,[illegible] tons) at [illegible] Emerty, [illegible] the [illegible] was [illegible], although [illegible] be applied on the school coal [illegible], is entitle to justify its demand for the $4,[illegible] under the contract. This is evidenced further by the first [illegible] February 27, the date of the payment [illegible], was the date [illegible] first time of this account [illegible] for it [illegible] and only then did [illegible] the coal [illegible].

The first instruction that the trial [illegible] by [illegible] that this [illegible] of [illegible] should be [illegible]

other than to the school coal contract, was by way of a memorandum on this voucher check of June 15. At this time there was a disagreement between the parties with reference to the school coal contract. However, there had been no dispute as to the amount due for washed coal, and it appeared from the evidence on behalf of both parties, that this was a separate transaction. Defendant admits the amount due for the said washed coal, but arbitrarily applies $1100.00 to the payment of it. Having once applied this $1100.00 on the school coal contract, plaintiff was not bound to transfer the credit to the washed coal account; and as the latter account was not in dispute, it can not be said as a matter of law, that the receipt of the check for $376.40 with the foregoing memorandum thereon, by plaintiff, without objection, constituted an agreement whereby the $1100.00 credit was to be transferred from the school coal contract to the washed coal account, and the $376.40 to be considered in full of the latter account. On the contrary, plaintiff was at liberty to ignore the memorandum on the back of said check, and apply the $376.40 as a partial payment on the washed coal account. It therefore became a question of fact for the jury to say whether or not by the acceptance of this check plaintiff had agreed that this $1100.00 might be applied to the payment of the amount due for washed coal. The jury, by their verdict, found that it was not, and from a careful reading of the evidence, we are firmly of the opinion that they were fully warranted in so finding. It is not in accordance with reason and probability, that men, having already received money and applied it, should, several months later, consent to the application of this same amount in payment of an account which had not even begun to exist at the

time the said payment was made, especially in view of the fact that the account to which it had already been applied was in dispute.]

Defendant also maintains that the jury in the United States court proceeding had determined as a matter of fact that defendant had not been credited with the sum of $1100.00 on the amount due under the school coal contract, but on the contrary, that the jury by their verdict had found that plaintiff had applied said $1100.00 in payment of the amount due on the washed coal account; that therefore such "essential fact having been determined by a court of competent jurisdiction may not be again passed on by another court in ligitation between the same parties." [Counsel admits in his brief, however, that the question whether or not such "essential fact" was passed on cannot be determined from the pleadings in that case in the United States court, because the declaration consisted only of the common counts, and the plea one of general issue, but contends that the doctrine of "estoppel by verdict" applies to the facts in the case at bar. This principle of law is set forth in Manna, et al v. Read, et al, 102 Ill. 596, wherein the court said (p.602):

> ***"Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not."]

Defendant farther asserts that in arriving at a determination as to whether or not such fact was adjudicated in a former proceeding, the rule of law as laid down in 23 Cyc. 1306

[a] The said judgment was made, apparently in view of the fact that the evidence to which it had already been applied was in dispute.]

Nevertheless also maintains that the jury in the [illegible] court proceeding had determined as a matter of fact that defendant had not been operating with the use of [illegible] in the manner the trial court contends, but on the contrary, that the jury by their verdict had found that liability had applied said [illegible] in accordance of the amount due on the matured [illegible]; that therefore such "essential fact having been determined by a court of competent jurisdiction may not be again questioned in the same or other in litigation between the same parties."[b] [illegible] adopts in his brief, however, that the question whether or not such "essential fact" was passed on cannot be ascertained from the pleadings in that case in the trial court alone, because the contention-[illegible] only of the common counts, and the plea one of general issue, but contends that the matters of "estoppel by verdict" applies to the issues in the case at bar. This principle of law is set forth in Bonne, et al v. Bonne, et al. 180 [illegible]. 492, wherein the court said (p.494):

> "Whether or not specific fact or question has been adjudicated in a former suit, can be shown only by reference to again put in issue in subsequent suit between the same parties. In determining the effect of a judgment in the former suit, it generally presumes and relies on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action in the same be both suits or not."]

Defendant further asserts that in arriving at a determination as to whether or not such fact was adjudicated in a former proceeding, the rule of law as laid down in 82 Ore. 1[illegible]

applies, which rule provides as follows:

> "Matters which follow by necessary and inevitable inference from the judgment - findings or determination of the court in relation to the subject matter of the suit which are necessarily implied from its final decision as being determinations which it must have made in order to justify the judgment as rendered are equally covered by the estoppel as if they were specifically found in so many words, or in other words, it is allowable to reason back from the judgment to the basis on which it stands and regarding the judgment as a conclusion and finding it to be one which could have been drawn only from certain premises, the premises are equally res adjudicata with the conclusion itself."

Defendant contends that, under the facts in evidence in the case at bar, it appears conclusively that the verdict of the jury (in the United States district court proceeding) can only be reconciled with the theory that the plaintiff had not applied the $1100.00 to the school coal contract.

The question whethereor not there was an estoppel by verdict was clearly one of fact for the jury, and the court in the case at bar so instructed the jury.

Defendant introduced evidence from which it contended that the jury should have concluded that the verdict in the United States district court was justifiable only upon the theory that plaintiff had not applied the $1100.00 on the school coal contract. Plaintiff introduced evidence from which it contended that the jury in the United States court must have arrived at their verdict upon the theory that defendant breached its contract and that plaintiff could recover on the basis of the market value of the coal sold during January and February, and not upon the basis of the contract price. Therefore, it was for the jury to determine whether or not the verdict

applies, which this provides, as follows:

> "Jurors must follow by reasoning and probable inference from the judgment - findings or ratiocination of the court in relation to the subject-matter of the suit which are necessarily implied from the final decision on issues which it must have decided in order to justify the judgment as rendered and actually entered by the original as if they were specifically found in so many words, or in other words, it is allowable to reason back from the judgment to the basis on which it stands and regarding the judgment as a conclusion and finding it to be one which must have been drawn only from certain premises, the premises are equally the judgment with the conclusion itself."

Defendants contend that, under the facts in evidence in the case at bar, it appears [illegible] that the verdict of the jury in the United States District court proceeding) was only to reconcile with the theory that the plaintiff had not received the $1100.00 to its school fund contract.

The question nevertheless not in no way an estoppel by verdict was clearly one of fact for the jury, and the court in the case at bar is interpreted the jury.

Defendant introduced evidence from which it contended that the jury should find that [illegible] verdict in the United States District court was justifiable only upon the theory that plaintiff had not received the $1100.00 on the school fund contract. Plaintiff introduced evidence from which it contended that the jury in the United States court must have arrived at their verdict upon the theory that defendant breached the contract and that plaintiff would recover on the basis of the market value of the coal mine during January and February, and not upon the basis of the contract price. Therefore, it was for the jury to determine whether or not the verdict

in the United States district court was based upon the theory advanced by plaintiff or upon that contended for by the defendant. The jury in the case at bar were evidently of the opinion that the verdict in the United States district court was based upon plaintiff's theory, viz., upon the market value of the coal plus the damages for the breach of contract. The court entered judgment upon said verdict. We are clearly of the opinion that both the jury and the court were warranted in arriving at their respective conclusions.

Defendant also assigns error on the question of interest, but in view of the fact that in the course of this opinion we have treated the amount due for washed coal as being undisputed, it was clearly entitled to recover interest.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

In the Indian Income Tax Act and Rules, the
tax liability determined by reference to the full com-
pensation for the destruction. The jury in the case is
not very familiar of the Rules that the vendors
in the Indian Income Tax Act are based upon
Plaintiff's theory, viz., upon the market value of the
real plus the compensation for the breach of contract. The
court entered judgment upon said verdict. We are clearly
of the opinion that both the jury and the court were
mistaken in applying it to a liability consideration.

Defendant also assigning error on the condition
of interest, but in view of the fact that we do not agree
of this opinion we have ignored the matter and the verdict
cost as being unchanged, it not clearly appears to
recover interest.

Finding no reversible error, the judgment will
be affirmed.

AFFIRMED.

378 20708

ANNA COX,
Defendant in Error,

vs.

RHODES AVENUE HOSPITAL,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY

198 I.A. 82

STATEMENT OF THE CASE.- This is an action of trespass on the case by defendant in error (plaintiff below) against plaintiff in error (defendant below) and also Dr. Frank Deacon, for the recovery of damages for the alleged wrongful detention amounting to false imprisonment in the hospital conducted by defendant company. During the trial Dr. Deacon was dismissed from the case and the trial proceeded against the hospital company alone.

In the amended declaration it was alleged that defendants were operating the Rhodes Avenue Hospital for profit; that plaintiff was a patient therein for reward; that she was recovering from the effects of a serious major operation which had been performed at the hospital; that on April 9, 1912 she was discharged from further hospital treatment by her surgeon, with permission to leave the hospital and return home; that she was in a weak and highly nervous condition, due to said operation, but that she was physically able to leave said hospital, and attempted to do so; that defendants, disregarding their duty on said date, demanded that before plaintiff be permitted to leave the hospital, she sign a promissory note for the sum claimed due defendants from plaintiff, for accommodation as a patient in said hospital; that said note contained a

warrant of attorney authorizing confession of judgment; that defendants informed plaintiff that unless said judgment note were signed she could not leave the hospital; that thereupon defendants wrongfully and oppressively detained her in said hospital, without probable or reasonable cause, for the space of three hours, contrary to the laws of the State and against the will of the plaintiff; that during said unlawful restraint, defendants applied threats and vile epithets to the plaintiff, by reason of which premises plaintiff was frightened and rendered hysterical and her weak condition aggrevated, and her recovery from the effects of said operation greatly retarded; furthermore, that plaintiff was exposed to disgrace and injured in credit and circumstances, whereby she suffered damages to the extent of $5,000. There was a second count in the amended declaration, but inasmuch as the court instructed the jury to disregard same, it is not necessary to consider it here.

To this declaration a plea of general issue was filed.

On the trial of the case before the court and jury, a verdict for $775 was returned, upon which judgment was rendered, to reverse which defendant has prosecuted this writ of error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

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Plaintiff on her behalf, testified that she entered defendant's hospital on March 23, 1912 to submit to a comparatively minor operation; that at that time she gave to Dr. Hertel, her surgeon, $30, for which she was given a receipt by defendant; this $30 was to pay for one week's accommodation at the hospital; that she was taken to the operating room on the 23rd, but was not then operated on because it was discovered she had other ailments; that on the 25th she was informed that she was suffering with a tumor; that on the 27th she was operated on for fibroid tumor, appendicitis, hemorrhoids, and cyst of the ovary; that because of these operations she was compelled to stay at the hospital longer than the time she had paid for; that on April 9 she was informed that she was physically fit to leave the hospital, by her physician, Dr. Hertel; that about five o'clock p.m. on the same day she was presented by one of the nurses, with a bill for $82 hospital charges; that her physician also told her that if the bill was not paid she would have trouble with the hospital; that he then handed her a judgment note for $82 which he requested her to sign and which she refused to execute; that at the time the bill was presented, she had but two or three dollars in her possession, and that she informed the nurse that she could not pay her bill then because she was unable to get any money until she could go to the bank; that she had arranged for a taxicab to call for her that evening at six o'clock; that she was later informed that the taxicab was there for her and she was asked whether she had signed the note and was told that unless it was signed

she would not be permitted to leave the hospital; that she requested that the chauffeur be sent to her room, but was informed that he would not be allowed to come into the building; that she then went to the window of the building and threw a dime to the chauffeur who was standing outside, to telephone her sister that she was being detained and could not come home; that at eight o'clock that same evening a lawyer by the name of Terwillinger, at the request of plaintiff's sister, came to the hospital; that when he came, he picked up her suitcase and walked out of the room towards the stairs; that they were met there by a Miss Whitcomb, the night nurse, and were told that she had orders from the office not to let her go; that she was, however, permitted to go downstairs so the matter might be discussed at the office; that there again a talk was had with the cashier who demanded that plaintiff either pay the bill or sign a note for the amount; that finally Mr. Terwilliger stated that she could not be held at the hospital for the payment of that debt, and that she would pay same as soon as she was able to do so; that while such conversation took place, someone who she believed to be Dr. Deacon, remarked that plaintiff did not want to pay her bill because she was a crook; that after a little more colloquy, the door was unlocked and plaintiff and Mr. Terwilliger went home. Plaintiff further testified that she was in a weak, hysterical condition thereafter; that she required assistance down the stairs and to her taxicab; that thereafter she continued to be in a weak and hysterical condition as a result of the acts of the defendant and that she was not able to do any work for six months after she

returned home from the hospital.

Mr. Terwilliger was also called as a witness, and corroborated the statements of the plaintiff as to what occurred while present, and what he did. Also, that when he came to plaintiff's room in the hospital, he found plaintiff in a hysterical condition and that he had to assist her out of the hospital to the taxicab.

The chauffeur corroborated the testimony of the plaintiff as to notifying her sister that she was being held at the hospital, and that he was not permitted access to the plaintiff and that he was ordered to take his machine from in front of the hospital; that at the time plaintiff entered his car she appeared to be in a weak condition and looked as though she had been crying.

Another witness - one Dr. Marpole - stated that he saw plaintiff on the day after she returned home; that he found her in a weak and highly nervous condition; that the occurrence at the hospital as related by the plaintiff would have a tendency to retard her recovery from the effects of the operation which had been performed on her.

On behalf of the defendant, Dr. Deacon testified that he knew nothing about the occurrence aforementioned, because he was not present. Dr. Hertel, testifying on behalf of the defendant, also stated that he knew nothing of the alleged alteration relative to the promissory note, and that there were no threats made against plaintiff in his presence. He did state, however, that he told plaintiff that she would better settle the bill and save trouble. He also testified that plaintiff was in a highly nervous condition

before entering the hospital, and that upon leaving it she was in better condition than at the time she entered it, and that at the time of the trial she looked better and weighed more than at the time prior to the operation.

Another witness for the defendant - a Miss Randel, the supervising nurse at the hospital - testified that plaintiff was not detained against her will; that there were no locks on the doors of the patients' rooms; that Dr. Deacon was not there at the time in question; that no one called plaintiff names; that when plaintiff was asked to pay her bill she became hysterical; that plaintiff said she would not pay it; that she also complained about Mr. Hertel and threatened to sue him; that plaintiff used the telephone that evening at 6:30; that she had never heard of plaintiff's alleged detention or the altercation relative to the judgment note, before this suit was started.

Another witness for the defendant - a Miss Schrubb, one of the nurses at the hospital - testified that she never made any threats concerning plaintiff; that nobody present made any threats; that plaintiff was not asked to pay her bill or sign a note; that she saw plaintiff walking about the building along the corridors, between 5:30 and 7 o'clock in the evening; that the doors were never locked, and that plaintiff was not detained.

On this state of the record, defendant contends, first that plaintiff had failed to prove the allegations in her declaration and that the trial court should have instructed the jury, at the close of plaintiff's case and at

the close of all the evidence, to find the defendant not guilty. In urging this contention, defendant asserts that, admitting the truth of all testimony offered on behalf of plaintiff, it did not present a case of wrongful detention against her will, amounting to false imprisonment. In this contention, however, we cannot concur, as there are numerous authorities which hold, under facts much similar, that plaintiff has a good cause of action. Hawk v. Hinsey, 33 Ill. 473; Coolahan v. Marshall Field & Co., 159 Ill. App. 466; McAleer v. Good, 216 Penn. St. 473; Martin v. Houck, 141 N.C. 317; Smith v. State, 26 Tenn. 43. In order that the plaintiff may recover it was not necessary that she should have been physically and forcibly detained by defendant in the hospital. If the conduct of the defendant was of such character as to make plaintiff, in the condition in which she then was, believe that if she attempted to leave the hospital she would be forcibly detained, then such conduct constituted a wrongful detention against her will. The facts and circumstances in evidence permit the application of this principle of law.

Defendant next contends, that under all the evidence in the case, the jury were not warranted in finding that plaintiff had proved her cause of action by a preponderance of the evidence. This presents to us the question whether or not the jury were warranted in arriving at their verdict for the plaintiff. The evidence given on behalf of the plaintiff and the defendant, presented a pure question of fact for the jury, as to whether or not plaintiff had been wrongfully detained against her will. The jury evidently believed the testimony offered on behalf of the plaintiff. The court, in entering

ing judgment on the verdict and in denying defendant's motion for a new trial, must have been of the opinion that the evidence supported the verdict. From an examination of the record, we cannot say that the verdict is clearly and manifestly against the weight of the evidence.

In coming to this conclusion, we are not unmindful of the contention by counsel, that it was not shown that the acts of the employees and representatives of the defendant complained of were within the scope of their authority; in our opinion that issue, as the other questions of fact, was determined by the jury against the defendant, and we cannot say that in so finding, the jury were acting clearly and manifestly against the weight of the evidence.

Defendant further contends, that the court erred in giving plaintiff's instructions 9-B, 10-C and 11-D. We have read these instructions carefully and are of the opinion that they correctly stated the law as applicable to the facts in the case.

Instructions of the same character were, under much the same circumstances, approved in Hawk v. Blaurock, supra, and Tooleman v. Marshall Field & Co., supra.

Defendant also complains of the refusal by the court of its offered instruction No. 1. However, that part of said instruction that was applicable to the facts, was covered by other instructions given on behalf of the defendant.

Defendant further complains that the court erred in the admission of testimony, viz., with reference to conversations had by defendant with Terwilliger and with the chauffeur.

(?)

outside of the presence of the representatives of defendant, and in refusing to instruct the jury to disregard such evidence. We find, from an examination of the record, that all conversations outside of the presence of the representatives of the defendant which were not part of the res gestae were ruled out. The other conversations were properly admitted as part of the res gestae; Graff v. Bellinger, 18 Ill. 201; Sachelson v. Chicago City Ry. Co., 239 Ill. 334; and the instruction directing the jury to disregard said evidence was properly refused.

Defendant next complains of improper acts on the part of counsel for plaintiff, with reference to the cross examination of Mr. Deacon. Whatever error there may have been in the question put by counsel for the plaintiff was waived by the witness when he insisted upon answering the question after objections thereto had been sustained, where such action on the part of the witness was concurred in by counsel for defendant, the witness in question being the superintendent of the hospital and the person in actual control of the affairs of defendant company.

Defendant insists that there is no evidence warranting the amount of damages awarded, and that the verdict must therefore have been the result of passion and prejudice. In cases of this kind, plaintiff has the right to recover not only actual damages but also punitive damages. The entire question of damages is one for the jury. We find nothing in the record which shows any act on the part of counsel or any witness, that tended to incite the prejudice or inflame the minds of the jury against the defendant. In

that view of the case, we see no reason to disturb the verdict.

Finding no reversible error, the judgment of the Circuit court will be affirmed.

AFFIRMED.

47 - 40917

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

HENRY JACOBY,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 88

STATEMENT OF THE CASE.-Plaintiff in error (defendant below) was charged by information with petit larceny. A jury having been waived, the trial proceeded to hearing before the court alone, who found defendant guilty as charged, and sentenced him to the House of Correction for three months and to pay a fine of one dollar and costs.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

In suing out this writ of error, defendant seeks a reversal because, as he alleges, there is no proof that he committed the crime of petit larceny as charged. He also complains that the court admitted improper evidence which was prejudicial to the defendant. This latter point we need not consider, however, if there is sufficient evidence in the record to sustain the judgment, for in a trial without a jury, it is presumed that the court, in entering judgment, considered only the competent evidence. Palmer v. Meriden Britannia Co., 193 Ill. 404; Grand Pacific Hotel Co. v. Finnerty, 217 Ill. 51; Illinois Steel Co. v. Prentis Machine Works Co., 219 Ill. 406.

Defendant makes the further point, that the amended information was defective in that it was not filed until all the evidence had been heard. We are of the opinion, however, that there is no merit in this contention. The crime of petit larceny was sufficiently charged in the or-

iginal information, hence it was not necessary to file the amended information. Furthermore, this point was not raised in the trial below and therefore it comes too late.]

The evidence shows that J. O. Kuntz, the complaining witness, while riding on a street car at 35th and State streets, in the City of Chicago, on September 11, 1914, suddenly found that his pocketbook was missing; that he saw defendant jump off the car; that he caused the car to stop as soon as possible, and ran back in the direction the defendant had taken; that when he neared the defendant, he saw him "with the pocketbook in his hand;" that he grabbed him and said, "Give her here," and that defendant handed him his pocketbook; that he took hold of defendant and inquired for an officer, when one Burgess stepped up and said, "Let me have him," whereupon Kuntz turned defendant over to Burgess, who, the evidence shows, represented himself to be an officer; that a police officer then arrived on the scene, to whom Kuntz related the incident; that he took defendant into custody, and when he found that Burgess had represented himself to be an officer and in fact was not, arrested him also; that Burgess resisted strenuously; that finally, with the assistance of another officer, the two were arrested.

Defendant testified that he resided in the vicinity of 35th street, and at the time in question, was on his way to procure theatre tickets; that he was crossing the street; that just as he reached the middle of the street, he stooped down and picked up a pocketbook, and just as he did so, Kuntz grabbed him; that the "other fellow came running over - the big fellow that was standing on the corner" (Burgess); and that a struggle followed, and that was all he knew; that he was not riding on any car that day. On cross examination he

admitted knowing Burgess.

Burgess, who also testified, stated that on the night in question, he was standing on the corner; that there was a man crossing the street on a run; that "he ran right up to this young fellow here" (defendant); that "it seemed like as if he was stooping down, and he (Kuntz) jumped right on his back and he knocked him down, and then four or five colored fellows came along there, and I went over there and I recognized this young fellow (defendant) as being a boy that I knew ever since he was a kid;" that he said, "What is the matter?" and defendant replied, "I don't know, this fellow jumped on me;" that he then said, "Let me have him;" that he was merely trying to find out what had happened; that finally defendant said, "Well, it is all right," and that defendant then handed Kuntz something, but what it was he did not know. Burgess also denied having represented that he was a police officer.

While there is some conflict in the evidence, yet the court saw the witnesses and heard them testify. He had the right to consider all the facts and circumstances, in connection with the case. He was sitting as court and jury. In the absence of errors of law, this court has no right to set aside the finding of a court, unless from a consideration of all the evidence, it clearly appears that there is a reasonable doubt of defendant's guilt.

After a careful examination of the record, we cannot say that defendant did not have a fair trial and that the finding of the court is not justified by the evidence. Accordingly, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

193 I.A. 91

No. - 4032

JOHN HANNING, Defendant in Error, vs. CHARLES E. ROLAND and THOMAS KENNESSY, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 91

STATEMENT OF THE CASE. This writ of error is prosecuted by plaintiffs in error (defendants below) to reverse a judgment entered in favor of defendant in error (plaintiff below), in a suit brought in the Municipal Court of Chicago against defendants and one Frederick Erb. Plaintiff's statement of claim was as follows:

"Plaintiff's claim is for labor and materials furnished for carpenter repairs and alterations to the building, No. [illegible] E. 41st street, Chicago, Illinois, [illegible] March [illegible] and April [illegible], 1914, under [illegible] defendant, Frederick Erb, the contractor, [illegible] fulfillment of the requirements said building for the owners thereof, viz.: the defendants Charles E. Roland and Thomas Kennessy; that the sum due this plaintiff for said work and material is [illegible]; that the plaintiff caused to be served the notices prescribed by the STATUTE IN RELATION TO Mechanic's liens upon the said defendants Roland and Kennessy on April 29, 1914, and April 30, 1914, respectively."

To this statement of claim defendants filed separate appearances and affidavits of merits. Thomas Kennessy denied ownership of the premises, and further, that the statutory notice had been served upon him as set forth in the statement of claim. Charles E. Roland admitted ownership of the premises in question, and further alleged that with reference to the labor and materials sued for, the same was the subject matter of a contract which he had entered into with one Frederick Erb, and that he did not know of plaintiff's ever having furnished the labor and materials on the premises in question; he further denied ever having received a notice of lien

claim as set forth in plaintiff's statement of claim. Frederick Erb, as a contractor, denied that he ever for himself, as a contractor, entered into an agreement with plaintiff to furnish labor and materials for the carpenter repairs and alterations to the building in question, and further denied that he had a contract for said repairs to said building with the owners thereof.

The record shows that plaintiff dismissed his suit as to defendant Erb, and that the court, trying the case without a jury, found the issues against defendants Roland and Hennessy, and assessed plaintiff's damages in the sum of $[illegible].49, for which amount judgment was entered.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

Defendants, in urging a reversal of this judgment, proceed upon the theory that plaintiff's action was brought under section 28 of our Mechanics' Lien Act, Ch. 82, Bird's R. S. of Illinois for 1911. They contend that a recovery by a sub-contractor must be against both the owner and the original contractor and the judgment must be a joint one, and furthermore, there must be a proper ten-day notice served upon the owners; that there were no findings by the court nor recitals in the judgment, of the facts required by our statute, viz., that the owner was indebted to the contractor, and the date from which said lien attached; that in the absence of such findings or recitals, (1) the court erred in entering said judgment, and (2) said judgment is void.

Plaintiff contends that under its statement of claim, he might have recovered against all the defendants under our Mechanics' Lien Act, supra, if the evidence showed that Frederick Erb, as a contractor, ordered the labor and materials used for, or against the owners claim, if the evidence

showed that the labor and materials in question were ordered by the said Erb as the agent or representative of the owners, Roland and Hennessy. A reading of plaintiff's statement of claim shows that plaintiff is correct in this contention.

Defendant Erb, by denying that he entered into a contract with plaintiff for the labor and materials in question, and in further denying that he had a contract with the owners of the premises to furnish said labor and materials, raised an issue of fact, the determination of which had a direct bearing upon the question whether plaintiff had the right to recover against all the defendants under the Mechanics' Lien Act, supra, or against the owners, Roland and Hennessy, alone.

It must be presumed that evidence was submitted in the case to determine that issue as well as any other issue presented by the statement of claim and the various affidavits of merits. The evidence upon which the trial court based its judgment was not preserved by bill of exceptions, statement of facts or stenographic report, as provided for in our Municipal Court Act. We must, therefore, presume, in the absence thereof, that the evidence offered was of sufficient probative force to sustain the court in finding the issues for the plaintiff and in entering judgment thereon. Van Horsen v. Berry, 100 Ill.App. 685; Culver v. Dehmlow, 133 Ill. 457; Blair v. Ray, 103 Ill. 618.

It must be further presumed by this court, that in the absence of anything in the record appearing affirmatively to the contrary, that the court correctly applied the law to the facts offered in evidence.

For the reasons hereinabove assigned, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED

474 21872

CLARA STIEFEL, Individually, and as Administratrix of the Estate of ABRAHAM STIEFEL,

Appellee,

vs.

AMALGAMATED SHEET METAL WORKERS' LOCAL UNION NO. 73, INTERNATIONAL ALLIANCE, a Corporation, THOMAS NEDDING, EDGAR RAY, B. A. SCHOOLEY, and PAUL CHRISTMAN,

Appellants.

APPEAL FROM SUPERIOR COURT COOK COUNTY.

198 I.A. 94

(Not to be reported in full)

STATEMENT OF THE CASE. ~~This is a~~ Bill for specific performance of insurance contract filed by Clara Stiefel, appellee, complainant below, as administratrix of the estate of Abraham Stiefel, deceased, against the Amalgamated Sheet Metal Workers' Local Union No. 73, International Alliance, and Thomas Nedding, Edgar Ray, B. A. Schooley, and Paul Christman, ~~defendants below, for the specific performance of a contract of insurance, by the terms of which~~ Complainant claims she was entitled to recover a certain death benefit or insurance fund, as a result of the death of the decedent, her husband.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

The bill of complaint alleged that the said Abraham Stiefel was, at the time of his death, a member in good standing, of the said Amalgamated Sheet Metal Workers' Local Union No. 73, International Alliance; that upon his death complainant was entitled to the death benefit, pursuant to the by-laws of the said union, which

by-laws were set forth in the bill. The bill further alleged that said death benefit consisted of a sum of money made up by the assessment of one dollar upon each member of said union, said assessment to be levied and collected, and paid to the complainant; that said B. A. Schooley, one of the officers of said union, refused to perform his duty to collect said assessment; that Thomas Redding, Edgar Ray, B. A. Schooley and Paul Christman were the duly qualified and authorized officers who were charged with the administration of the affairs of the said union, and the collection and disbursement of its funds; that said officers refused and neglected to perform their duty and were confederating to injure and defraud complainant.

To this bill, answers were filed by the Amalgamated Sheet Metal Workers' Local Union No. 73, and by the several individual defendants, putting in issue the allegations in the bill of complaint.

Upon a hearing on said bill and answers, the chancellor found the issues for the complainant and entered a decree, part of which was as follows:

> "That the defendant, Amalgamated Sheet Metal Workers' Union, Local No. 73, International Alliance, pay to the complainant, the sum of $1331.00 within ten days from the entry of this decree, and that the other defendants, Thomas Redding, Edgar Ray, B. A. Schooley and Paul Christman, officers of the said defendant corporation, cause said sum of $1331.00 to be paid by said defendant Union within ten days, in default thereof the complainant has the right to apply to this court hereafter for all necessary orders to enforce and obtain the relief granted by this decree, and this court retains jurisdiction of this case for said purpose."

In said decree there was incorporated the prayer for an appeal, which was in the following language:

> "And the defendants by their solicitors duly except to the entry of said decree, and pray an appeal therefrom to the Appellate Court of Illinois, First District, which is allowed upon the defendants filing a bond in the sum of sixteen hundred dollars to be approved within forty days by the court, and the defendants are given leave to file a certificate of evidence within sixty days."

This is a motion on behalf of the complainant to dismiss the appeal for failure on the part of appellants to comply with the prayer and order of appeal.

The record shows that the appeal was prayed for by all defendants and was allowed for all of them. The prayer for the appeal was joint and not several. The decree allowing the appeal required a bond to be filed by all the defendants. The record shows that the appeal bond was signed by only three of the five defendants; defendants Ray and Christman not having joined therein.

The authorities in our State uniformly hold that the right of appeal is purely a statutory one and can be availed of only when allowed by court, and must then be in conformity with the prayer for the appeal and the order of allowance. First Congregational Church of Harvard v. Page, 255 Ill. 267; Illinois v. Hammond, et al., 189 Ill. 476; Fortune v. Gilbert, 207 Ill. 235; Fedrick for use v. Wells, 152 Ill. 214; Lingle v. City of Chicago, 210 Ill. 600

The record shows that while the appeal was granted to all the defendants, it was perfected by only three of them. This is not in compliance with the prayer or order of appeal, and therefore the motion to dismiss the appeal must be allowed.

In this divorce case, we interpreted the

proper law on appeal, which was as the following language:

> "Was the defendant by their activities
> and conduct to the entry of said judgment, and
> was the appellant, as the appellate court of
> Illinois, First District, which is without
> over the defendant Filing a bond in the sum of
> sufficient amount to be conserved which in
> fact was in the amount, and the defendants
> are given leave to file a certificate of evidence
> within sixty days."

This is a motion in behalf of the respondent

to dismiss the appeal for failure on the part of appellants

to comply with the proper and order of appeal.

The [illegible] appeal was [illegible]. The

by all [illegible] [illegible] the [illegible]. The

proper [illegible] [illegible] [illegible]. The

[illegible] [illegible] [illegible] [illegible] to [illegible]

by all the [illegible]. The [illegible] [illegible] [illegible]

bond was signed by only [illegible] of the [illegible]

defendants [illegible] [illegible] [illegible] [illegible].

The [illegible] [illegible] [illegible] [illegible] [illegible]

The right of appeal is purely a statutory one and can be

exercised only when allowed by [illegible], and [illegible] be in

conformity with the [illegible] for the [illegible] and the [illegible] of

[illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] 111. [illegible]; [illegible] v. [illegible], [illegible] 111. [illegible];

[illegible] v. [illegible], [illegible] 111. [illegible]; [illegible] [illegible] v. [illegible],

[illegible] 111. [illegible]; [illegible] v. [illegible] of [illegible], [illegible] 111. [illegible]

[illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

In counter suggestions to the appellee's motion to dismiss the appeal, counsel contend that the only real defendant was the Amalgamated Sheet Metal Workers' Local Union No. 73. If that is true, why did Thomas Redding and E. A. Scholey, join in the appeal and in the appeal bond? Moreover, the bill made both Christman and Ray defendants, and made certain charges against them. These charges were met by answers on behalf of said defendants. The decree ordered all individual defendants, including Christman and Ray, (who did not join in the appeal) to perform certain acts. The prayer of the appeal showed that all defendants felt themselves aggrieved, and consequently they all joined in the prayer for the appeal.

If there were any findings in the decree which affected one as separate from the others, whereby the parties did not wish to prosecute the appeal jointly, it was their privilege at the time the decree was entered, to pray separate appeals. This they failed to do, and the mere fact that counsel suggest that no substantial rights of the said defendants, Christman and Ray, were affected by this decree, cannot be urged against the plain provision of the law, that having prayed an appeal jointly, it must be perfected jointly.

APPEAL DISMISSED.

169 - 20483

[illegible]

[illegible] Corporation,
[illegible] in error,

vs.

[illegible] in error.

198 I.A. 98

(2. [illegible] delivered the opinion of the court.

The defendant in error, hereinafter referred to as plaintiff, recovered a judgment against the plaintiff in error, hereinafter referred to as defendant, for $[illegible]. From the evidence it appeared that the defendant was the attorney and president of the Hot Springs Medical Institute and the Orpheum Dental Parlors. He owned one share of stock in each corporation. Plaintiff offered in evidence a note of J. L. Donahue for $[illegible], dated September [illegible], 1912, payable three months after date to the order of the plaintiff, with interest at six per cent. per annum, and also the following document:

"Chicago, May 20, 1912.

"Printzler Advertising Company,
Chicago, Ill.

"Gentlemen:-

"You are hereby authorized to insert advertising for the
Hot Springs Medical Institute,
and
Orpheum Dental Parlors,
for the month of June, which shall not in any event exceed the sum of Seven Hundred and Fifty Dollars ($750.00) for which we agree to be responsible.

"Yours respectfully,
(Signed) J. L. Donahue
(Signed) Louis L. Orr."

Underneath this appears the following notation:

"This applies to note of J. L. Donahue for sum of Five Hundred Forty-eight and 33/100 Dollars (June 20th, 1912), taken in payment of balance due on account to date Aug. 20th, 1912.
(Signed) Louis L. Orr."

(Record & contd. on next page)

Insert "A" on line 2 and "B" on line 5 To here

The defendant testified that this notation was in his own handwriting, and made by him at the time the note referred to was signed and delivered.

The principle upon which defendant seeks to reverse this judgment is that this notation at the bottom of the advertising contract, if binding at all, is no more than a contingent guaranty of the note. We cannot agree with this view. By the contract the defendant, with Donahue, ordered the insertion of the advertising, and agreed to be responsible for it, and consequently was primarily liable to the extent of the amount ordered, namely, $750.00. When the defendant, by writing the notation at the foot of the contract, says, "this applies to note of J. L. O'Donahue," etc., he says expressly that he agrees to be responsible for that note; when he says, "Taken in payment of balance due on account to date," he says nothing less than that the advertising had been furnished as a part of the same account, which it appears, had been contracted for by defendant and Donahue jointly. This document is, in our view, a direct admission that upon defendant's order work had been performed by the plaintiff to the amount of $948.25, for which he was responsible. That being an account stated, plaintiff was entitled to interest, and the giving of a note of one jointly liable would not constitute a payment of the obligation unless the note itself was paid. Moreover, if it were admitted that defendant was not liable on the ground that he was one of the parties responsible for the advertising, it is clear that he has an absolute guarantor of the note in evidence. He has said in words that his contract to be responsible for the advertising account applies (and we must assume it applies with equal force) to the note given in payment of the balance due on the

same account. We do not see how language could be used which would express more clearly an intention to be absolutely responsible for the payment of the note. Defendant's contention that this language "must be construed most strongly in favor of the guarantor," is contrary to the ruling of our Supreme Court in Wagner v. Deering, 204 Ill. 308, where it is said at p. 308: "The contract of guaranty should be construed as favorably to the creditor as other written contracts." It therefore follows that as the note was not paid, plaintiff was entitled to judgment against the defendant without showing any attempt to enforce payment against the maker of the note. In this view of the matter it will not be necessary to consider the rulings of the court with reference to the admission and exclusion of evidence, as that evidence had only to do with the questions of insolvency and diligence.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

274 - 20601

OWEN B. VAUGHN,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 100

MR. JUSTICE GOODWIN delivered the opinion of the court:

This writ of error was sued out to reverse a judgment against the plaintiff in error, hereinafter referred to as defendant, in favor of the defendant in error, hereinafter referred to as plaintiff, for twenty-seven days' wages as a carpenter in the police department. The trial was before the court without a jury, and the evidence was preserved by a stenographic report of the trial. Plaintiff contends that as there was no statement of any judgment incorporated in the stenographic report, the judgment must be affirmed. Our Supreme Court, however, in Miller v. Anderson, 269 Ill. 608, has held that under the amendment enacted in 1911 to section 81 of the Practice Act, it is not necessary to preserve an exception to the judgment, nor is it necessary to recite the judgment in the stenographic report or bill of exceptions. Upon the trial it appeared that of the 27 days for which plaintiff recovered, 10 days were in May, 1913, while he was absent, as he claimed, on a "double header" vacation of 21 days, and 17 made up the period in November, 1913, during which he was suspended from duty pending investigation of charges. It subsequently appeared from his own testimony that the

174 - 2020

[illegible]

Defendant in error,

vs.

[illegible]

Plaintiff in Error.

ERROR TO

[illegible]

CT CHICAGO.

1950 L.A. 100

MR. JUSTICE GOODWIN delivered the opinion of the court:

This writ of error was sued out to reverse a judgment against the plaintiff in error, Berquist, referred to as defendant, in favor of the defendant in error, Hetherington, referred to as plaintiff, for twenty-seven days' wages as a conductor in the police department. The trial was before the court without a jury, and the evidence was preserved by a stenographic report of the trial. Plaintiff contends that as there was no statement of any judgment incorporated in the stenographic report, the judgment must be affirmed. The Supreme Court, however, in Miller v. Anderson, 389 Ill. 608, has held that under the amendment enacted in 1911 to section 82 of the Practice Act, it is not necessary to preserve an exception to the judgment, nor is it necessary to recite the judgment in the stenographic report or bill of exceptions. Upon the trial it appeared that of the 27 days for which plaintiff recovered 10 days were in May, 1919, while he was absent, as he claimed, on a "double header" vacation of 21 days, and 17 made up the period in November, 1919, during which he was suspended from duty pending investigation of charges. It substantially appeared from his own testimony that the

charges were sustained and he was dismissed from the City's employ.

From an ordinance in force January 15, 1912, it appears that skilled laborers who had been in the service at least a year were entitled to a vacation of eleven working days. Plaintiff claimed that he was entitled to and had been allowed a "double vacation" in May on account of his failure to take a vacation during the previous year, but the ordinance in evidence specifically provided that "All persons eligible for leave of absence with full pay, as hereinbefore provided, shall be entitled to such leave of absence during any fiscal year, and in no case shall these periods be cumulative." Plaintiff was allowed, and received full compensation for, eleven days' vacation in May, and under the ordinance he was not entitled to anything more, and no authority is shown in any officer to grant him the "double-header" vacation claimed, but, on the contrary, the ordinance itself expressly forbids the allowance of any such cumulative vacation.

Under Chicago v. People, ex rel Gray, 210 Ill.84, a civil service employe of a municipality cannot recover wages for a period during which he was under suspension and did not work unless and until he has been properly reinstated. This disposes of plaintiff's claim for the remaining seventeen days. The record in this case conclusively shows that the claim of plaintiff was entirely without basis in law. The judgment of the Municipal Court must, therefore, be reversed.

REVERSED.

charges were sustained and he was dismissed from the City's employ.

From an ordinance in force January 15, 1912, it appears that skilled laborers who had been in the service at least a year were entitled to a vacation of eleven working days. Plaintiff claimed that he was entitled to and had been allowed a "double vacation" in May on account of his failure to take a vacation during the previous year, but the ordinance in writing very specifically provided that "All persons eligible for leave of absence with full pay, as hereinbefore provided, shall be entitled to such leave of absence during any fiscal year, and in no case shall these periods be cumulative." Plaintiff was allowed, and received full compensation for, eleven days' vacation in May, and under the ordinance he was not entitled to anything more, and no authority known in any officer to grant him the "double-header" vacation claimed, but, on the contrary, the ordinance itself expressly forbids the allowance of any such cumulative vacation.

Under Gilmore v. Kansas, ex rel. Green, 210 Ill.94, a civil service employe of a municipality cannot recover wages for a period during which he was under suspension and did not work unless and until he has been properly reinstated. This disposes of plaintiff's claim for the remaining seventeen days. The record in this case conclusively shows that the claim of plaintiff was entirely without basis in law. The judgment of the Municipal Court must, therefore, be reversed.

REVERSED.

[illegible], Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
[illegible] IN [illegible], doing business as [illegible] & COMPANY, Plaintiff in Error.	OF CHICAGO.

193 I.A. 102

MR. JUSTICE [illegible] delivered the opinion of the court.

This writ of error is brought by the plaintiff in error, hereinafter referred to as the defendant, against the defendant in error, hereinafter referred to as the plaintiff, to reverse a judgment for $[illegible] obtained upon a check drawn by the defendant in favor of the Hanna-Breckenridge Company, and by it endorsed to the plaintiff. In the Municipal Court the defendant filed an affidavit of merits stating that the check was procured from the defendant by the payee by fraud and misrepresentation; that payee, at the time the check was given, fraudulently represented to defendant that it was the owner of certain promissory notes to the value of $[illegible]; that said notes would be paid at maturity; that makers of said notes were solvent and would pay the same when due; that said makers were, in fact, insolvent and payee knew them to be insolvent and that the notes would not be paid; that defendant believed said representations and gave payee a check for $[illegible]; that all statements made were false, and known by payee to be false and fraudulent, and made for the purpose of obtaining the check for $[illegible]; that plaintiff never paid any value for the check and was not an innocent holder; and that the check was delivered to him for the purpose of aiding in a scheme that he was the owner and holder of said check for value.

On the trial, which was before the court without a jury, a deposition of the plaintiff was received in evidence to the effect that he had had business dealings with the payee of the check for a period of two years; that some time between November 7, the date of the check, and November 28, the date it was protested, he received it to apply on an account of about $4,000 owing him, and that no part of that amount has ever been paid; that he deposited it in the bank, was credited with it, and afterwards it was protested and returned.

The defendant was called in his own behalf, and testified that he had a conversation with the president of the payee company at the time he delivered the check to him. Objection to this conversation was sustained. His counsel offered to prove that on the day the check was dated the president of the payee company stated to defendant that he would not use the check under any circumstances; that plaintiff was not indebted to the payee at that time, and "that upon said representations that he would not use the check, meaning they would not put it in the bank for collection," defendant gave him the check; that the payee company had offered for sale to defendant on said dates, notes to the amount of $2,500; that said notes were of no value; that the payee owes Strauss over $5,000, and that the president of the payee had the note in his possession as late as the 20th of November. Aside from the proof made in regard to the distances of different towns from Chicago, this was all the evidence offered or received.

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It is clear that upon the evidence received, plaintiff was entitled to judgment. The question then arises upon the defendant's contention that the court erred in excluding evidence offered on behalf of the defendant.

A comparison of the affidavit of meritorious defense and the evidence offered and excluded, shows no connection between the two. In his affidavit defendant alleges that payee obtained the check by fraudulently representing that he was the owner of certain promissory notes of a certain value, with solvent makers, and which would be paid at maturity. The proof offered is only that the payee said that he would not use the check under any circumstances, meaning they would not put it in the bank for collection (a matter which is in no way relied upon in the affidavit); that payee had offered for sale to the defendant notes to the amount of $2,500, which were of no value, and defendant at the time of the trial was not indebted to the payee. This does not in any way make out the defense relied upon or, in fact, any defense. Had this evidence been received, it would still have been the duty of the court to enter judgment. The offer of proof was made in connection with the testimony of defendant, who, himself, swore to the affidavit of merits in which it was stated that the false and fraudulent representations were made to him. He did not make the affidavit upon information and belief, but as of his own knowledge, yet, when he is on the stand and his counsel makes an offer of proof, he does not offer to prove facts or circumstances sustaining the defense alleged. It is a well settled rule of law that where the evidence establishes a cause of action, and defendant makes an offer of proof which is excluded, the judgment will not be reversed unless the specific facts offered to be proved are sufficient to establish a defence. (Lucas v. Meebe, 80 Ill. 407.) It is, of course, not necessary that the proof offered should, in itself, make out the defense. It would be sufficient if the proof offered would, when viewed in its most favorable light and considered in connection with the other evidence

cause of action

received or expressly offered on behalf of the defendant, constitute a defense. In this case the defendant's own testimony was all that was offered in his behalf. The testimony offered did not constitute a defense in itself or when taken in connection with the other facts in evidence or solely in connection with his own admitted testimony, nor was it supplemented by any offer of other evidence. The judgment must, therefore, be affirmed.

AFFIRMED.

598 - 20938.

PETER MULLER and JACOB MULLER,
Appellants,

vs.

ABRAHAM BERNSTEIN and HARRY WOLFF,
Appellees.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 104

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellants, hereinafter referred to as plaintiffs, brought suit against the appellees, hereinafter referred to as defendants, to recover damages for the defendants' failure to terminate certain leases then in existence, by giving the proper sixty-day notice so that the right to possession of said premises would accrue to plaintiffs under the terms of a lease from the defendants to plaintiffs. In the lease sued on, dated April 25, 1910, the defendants demised to plaintiffs two stores from May 7, 1910, to April 30, 1920. The tenth clause of the lease provided that "It is further covenanted and agreed by the parties of the first part that the parties of the second part shall have said demised premises free of any rent to July 1, 1910, but said parties of the second part agree to assume all responsibility of eviction, if necessary, the present lessees of said demised premises, but parties of the first part agree to serve as witnesses should their testimony be required."

Upon the first trial of this cause, Judge the Municipal Court struck the plaintiffs' statement of claim from the files on the ground that it did not state a cause of action, and on

appeal to the Appellate court (Muller, et al v. Bernstein, et al. 183 Ill. App. 154.) it was held that the tenth section of the lease placed the duty of terminating the prior leases by May 7, upon the defendants and lessors. Mr. Justice Brown, speaking for the court, said, at p. 157: "The lease to the plaintiffs implied a covenant for quiet enjoyment, but did not imply or express any covenant to place the second party in possession. That is, it implied that the parties of the first part had the legal right to give and the parties of the second part the legal right to enforce possession of the premises for the term reserved, but left to the second party the burden of enforcing that right. (Gazzolo v. Chambers, 75 Ill. 75.) The clause in question as we construe it did nothing more than make an express statement of the situation which the law made without it."

Upon the second trial from which this appeal was made, the Municipal Court admitted testimony offered for the purpose of showing that the intention of the parties was to place the burden of terminating the lease on the plaintiffs and lessees, and on the evidence so offered the court held that the plaintiffs were charged with that duty, and we entered judgment for the defendants. As there was nothing ambiguous in the language of the lease, it could not be varied by any extrinsic evidence. The case of Graves v. Rose, 246 Ill. 80, cited by defendants in support of their contention that evidence may be received for the purpose of showing

that the language, when applied to the facts, was really ambiguous, was a case involving the question of latent ambiguities in wills, and has no application here.

Upon the admitted facts plaintiffs were excluded from the possession of the premises demised, by reason of the defendants' failure to perform their implied covenant for quiet enjoyment, and as this court has already held in Muller v. Bernstein, supra, plaintiffs were entitled to recover on account of that default. The question then is as to the amount which they are entitled to recover. Plaintiffs' claim the right to recover the value of the use of the demised premises from May 7 to August 31, the day they obtained possession, inclusive. We are of the opinion, however, that after plaintiffs had learned that the lessee of these in possession had not been terminated, they could, by the service of timely notices, have terminated the leases by July 31, and that the proper measure of their damages is the value of the use of the premises from May 7, when under the terms of the lease they were entitled to possession, to that date. The undisputed evidence offered in the court below shows that the value of the use of the premises during that period was $300 a month, which is the rental reserved in the lease. This was not contradicted by any evidence offered by the defendants, and no exception was preserved by the plaintiffs to a finding by the court based on that valuation. In this state of the record we must hold that the value of the use of the premises is conclusively shown to be the sum of $300 a month. It therefore appears that by reason of the defendants' failure to perform the implied covenant of their lease for quiet enjoyment during

the time demised, the plaintiffs were unlawfully deprived of the premises from May 7, 1910, to July 31, 1910, and are entitled to recover the value of the premises for that period, which is shown to be $830. The judgment of the Municipal Court will, therefore, be reversed and judgment entered here for that sum.

REVERSED AND JUDGMENT HERE.

198 I.A. 104

BEF - [illegible].

[illegible] and [illegible], Appellants,	APPEAL FROM THE PRINCIPAL COURT OF ACCIAL.
vs.	
[illegible] and [illegible], Appellees.	

ADDITIONAL CAUSES FILED BY PETITION FOR REHEARING.

LD. JUSTICE [illegible] delivered the following opinion.

The appellees have filed a petition for rehearing in which they urge: (1) that oral evidence was competent because objection was waived; (2) that on the evidence the judgment of the court below was clearly right; (3) that the court erred in construing the lease; and (4) that the appellants could not reasonably be entitled to more than [illegible].

In support of their contention that the court erred in the construction of the lease, counsel for the petitioners contend that the opinion of Sir Justice [illegible] in the former appeal did not attempt to construe the lease in question, but rather (if we understand counsel correctly) placed a tentative construction upon an instrument which he himself considered doubtful, and that consequently, its meaning may be determined by resorting to parol evidence. Upon a careful consideration of counsel's argument, we remain firmly of the opinion that the Appellate Court in the former case construed the instrument in question; that that construction is binding on us now and moreover was, in my opinion at least, correct.

The defendants had leased the premises in question to the plaintiffs for a term to extend from May 7, 1910, to April 6th, 1920. There was an existing

#####ing leases which could be terminated in suitable fashion on the part of the landlords. [illegible] the Commission, in verifying [illegible] for evict and [illegible], and while the lessors did not [illegible] to evict the tenants in possession, they did, by their act of denying the [illegible] movement that they had the legal right to evict and the parties of the second part the legal right to enforce, [illegible] of the [illegible] for the term reserved, and left to the plaintiff parties the number of enforcing that right. ([illegible] v. [illegible], 72 Ill. 77; [illegible] v. [illegible], 103 Ill. [illegible]). The question that arose in this case was as to whether the 10th and 11th clauses, they read together, created a different situation. The 10th clause provided that the lessors should have the rental premises free of any rent to July 1, 1910, but said parties of the second part (plaintiffs) agreed to assume "all responsibility of eviction, if necessary, the present lessees of said demised premises, but the parties of the first part agree to serve as witnesses, should their testimony be required." In this [illegible], the parties of the second part agreed to evict the present lessees, if necessary. To evict is to dispossess, pursuant to judicial decree, those who are unlawfully in possession, and the responsibility of eviction, if necessary, was already and unmistakably upon the lessees in holding by legal process [illegible] in possession, if they wrongfully withhold it. Petitioners seek to interpret the word "eviction" in such not merely expelling those who are unlawfully in possession, but the process of legally terminating the then existing leases. Such a construction is strained contrary to the meaning of the word "eviction," and is unsound in the [illegible] of the conflicting [illegible] [illegible]

Cont'd over

[illegible] be impertinent if the meaning contended for were adopted. The construction placed upon the words by Mr. Justice Brown, and adopted here, is further strengthened by the words "at parties of the first and second part to appear as witnesses touchs their testimony be required in evidence by" the one thing for which their testimony could be required would be to the fact whether had issued the expiration notice to be served.

[illegible] in the 11th clause [illegible] in any way contradict this meaning. In the 11th clause the lessors gave the lessees the right to remodel the building, and agreed to pay them $500 "to apply on the total cost of said alterations and improvements." While it was agreed that the alterations and improvements should cost at least that amount. [illegible] the agreement that the clause [illegible] the contention that the parties of the second part should have the premises free of any rent to July, 1910, was given in consideration for their assuming the burden of evicting the tenants, and to cover the time that it would take to evict them, is without merit. The lease was for a long term; the plaintiffs were to remodel the stores and sub-divide them, and the improvements were to cost at least $500. If anything is to be deduced from this state of facts, it is that the abatement in rent to July 1, 1910, was made on account of the length of time that the plaintiffs would be deprived of any productive use of the premises by reason of the fact that they were being remodeled and sub-divided.

The reason for the insertion of the phrase "but said parties of the second part agree to assume all responsibility of eviction if necessary" is quite obvious. In the 10th clause, the defendants "covenant and agree" that the plaintiffs "shall have said leased

premises" then of the rent to July 1, 1911. They may well have found that these words, standing alone, which constitute a covenant not merely that plaintiffs should have the right to possession, but should have actual possession of the property during that period, and consequently added the words which make it clear that the burden of evicting the tenants in possession, if necessary, should remain with the lessors.

If this construction is correct, then, it can make no difference whether objection to the oral evidence was waived or not. For if the oral evidence had been admitted without objection, it could not have the effect of modifying what by law is an unambiguous written instrument. In other words, the rule which prevents the varying of a written instrument by oral evidence, is one which does not admit of an effect to oral evidence even when it is properly in the record, but we do not think that objection to this evidence was waived. The record discloses that the oral evidence referred to was properly objected to and was all admitted in evidence over the plaintiffs' objection. The declaration that plaintiffs waived objection to that part of evidence by introducing similar evidence themselves, is without weight for the reason that plaintiffs offered no evidence of that kind in presenting their case. [illegible]

One of plaintiff's witnesses

[illegible] testified in regard to a conversation with the defendant Dornstein in regard to the service of the sixty-day notice upon the tenants. Dornstein testified directly contrary to Seiger, and in addition related an alleged conversation with Seiger in which they discussed the length of time it would take to get the tenants out, and as to an allowance of sixty days on that account. To rebut this testimony which discredited the testimony of Seiger upon the material point of what had been said with

reference to the notices having been served. Weiger stated on rebuttal, in chief, that there was nothing said by Bernstein or himself with reference to the length of time which would be required to put out the tenants. He also said: "We discussed the length of time it would take to put in the repairs, and Bernstein agreed to allow sixty days, and in addition to that, he was to allow $400 for the improvements;" that the dollars expected to expend was or three thousand dollars and that it would take considerable time before they could occupy the premises, and that Bernstein had not said that he did not know whether or not the notices had been legally served. Plaintiffs had properly introduced evidence in regard to what had been said with reference to notices having been served, since the failure properly to serve notices and terminate the tenancy was a material issue in the case. Then, therefore, defendants introduced evidence contradicting this testimony, and went into details in regard to what they claimed had actually been said, it was proper for the plaintiffs to recall their witness and contradict these statements; not to have done so would have been an implied confession that statements had been made which were utterly at variance with plaintiffs' witness' original testimony. This testimony did not in any way constitute a waiver of the objections made to Bernstein's testimony. The rest of the testimony of Weiger quoted in plaintiffs' position the substance was brought out on cross-examination and for that plaintiffs were not responsible. As the contention that the amount of the judgment allowed here was erroneous is based upon conclusions drawn from moral evidence which we have held to have been improperly admitted, it is also without merit.

[illegible]

MR. JUSTICE O'CONNOR, specially concurring:

I concur in the final conclusion that the petition for rehearing should be denied, but not in all the reasoning of the foregoing opinion. I am of the opinion that the question here raised, as to the construction of the lease, was determined on a former appeal to this court, in an opinion by Mr. Justice Brown (Muller v. Bernstein, 183 Ill. App. 157). The same case is presented on this appeal as was presented on the former appeal, and the parties are the same. The law as announced in the opinion of this court on the former appeal is, therefore, the law of this case, and the construction of the lease is not now an open question.

21617 - 222

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	WRIT OF ERROR,
vs.	TO THE MUNICIPAL COURT,
EMIL SCHMUTZ, Plaintiff in Error.	OF CHICAGO.

198 I.A. 108

MR. JUSTICE SCHMIDT delivered the opinion of the court:

This writ of error was sued out to reverse a judgment against the plaintiff in error, based on an information which charged that he wrongfully and unlawfully abandoned his wife Matilda Schmutz.

At the hearing it appeared that the plaintiff in error had previously been married to one Iva May Meyers, who was granted a divorce from him June 5, 1905, in the Superior court of Cook county, and that he married the complaining witness in this case April 21, 1908 at Crown Point, Indiana.

It is clearly the law of this State that, after July 1, 1905, when the act of May 13, 1905 concerning the marriage of divorced persons went into effect, no party to a divorce, granted for any of the causes contained in section 1 of the divorce act, could contract a valid marriage (except a re-marriage to the other party to the divorce) within a year from the date of the divorce decree, even though that decree had been entered prior to the time when the act of 1905 took effect. Olson, County Clerk v. People, ex rel. Buchmer, et al., 219 Ill. 40; Wilson v. Cook, 256 Ill. 400.

From this it clearly follows that, under the facts disclosed, the complaining witness was not the wife of plaintiff in error and, consequently, his conviction, under the information in this case, cannot be sustained.

JUDGMENT REVERSED.

647 - 20985

PETER LARSON,

Appellee,

vs.

WARD CORBY COMPANY, a Corporation,

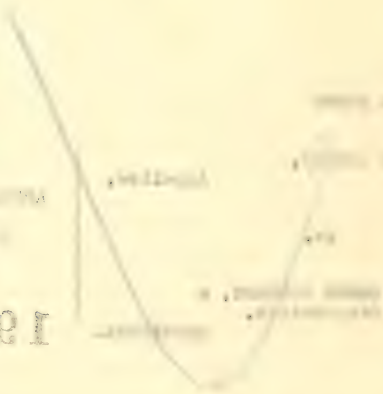
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

198 I.A. 109

MR. JUSTICE O'CONNOR delivered the opinion of the court:

This is an action on the case brought by appellee against appellant, to recover for personal injuries. A judgment was entered for $2000 in favor of the appellee against the appellant. The parties will be designated plaintiff and defendant as in the court below. The facts are these: April 19, 1910, at about 11 o'clock in the forenoon, plaintiff was riding east in Washington boulevard, Chicago, on his bicycle. Washington boulevard runs east and west and is intersected at right angles by California avenue. As plaintiff reached the intersection of California avenue, a funeral procession, consisting of about thirty carriages was moving north in the center of said avenue. Plaintiff dismounted from his wheel, waiting for the procession to pass, and stood near the southwest corner of the intersection of said boulevard and avenue. At the time the funeral procession was passing, a two-horse team belonging to the defendant, with driver and empty wagon, was going west in Lake street, which runs parallel with and is two blocks north of Washington boulevard. When the team reached California avenue, the funeral procession was



passing north across Lake street in said avenue. The driver, to avoid delay and not being able to pass through the funeral procession, turned south in California avenue and drove along the east side of said avenue, the funeral procession proceeding north about the center of the same. The evidence tends to show that as the team approached the north side of Washington boulevard, the last carriage in the funeral procession was nearing the south side of said boulevard. As the last carriage approached Washington boulevard, plaintiff mounted his wheel intending to cross the avenue and proceed east on Washington boulevard. He turned towards the south to go around the rear of the last carriage, and then turned east or northeast. As he came around the rear of the last carriage, defendant's team, which was "going south on a fast trot" as one witness put it, turned to the southwest so as to get on the west side of the street, and collided with the plaintiff. Neither the driver of the team nor the plaintiff knew of the approach of the other until they were but a few feet apart. Both the driver and the plaintiff tried to avoid the collision, but were unable to do so. The pole of the wagon struck the plaintiff in the jaw and he was thrown to the pavement; sustaining an oblique fracture of the left lower jaw bone, a fracture of the right clavicle, and he was otherwise bruised and injured. The driver stopped the team and assisted the plaintiff to a doctor's office in the vicinity. Plaintiff was in the hospital for about two weeks. After the injury he was unable to work for about thirteen weeks. When he returned to work he was unable to properly do his work on account of the injuries.

Prior to the accident plaintiff was employed as a night watchman, doing janitor work and sweeping up the floors around a factory. He earned $12 per week. The case was tried before the court and jury, and a judgment for $2000 was entered in favor of the plaintiff. An appeal was taken to this court, where the judgment was reversed and the cause remanded for errors of law. (184 Ill. App.38). On a second trial a verdict was returned and a judgment entered for the same amount in favor of the plaintiff to reverse which this appeal is prosecuted.

Defendant contends that the plaintiff did not exercise due care and caution for his own safety; that the evidence tends "to show that the plaintiff was injured as a result of his own negligent conduct." This contention raises the question as to whether the plaintiff was guilty of contributory negligence. This is generally a question of fact for the jury. (Patterson v. Chicago City Ry. Co., No. 21017, Appellate Court, First District; Seybert v. Stirling D. & M. Ry. Co., 187 Ill. App. 573; Chicago Union Traction Co. v. Jacobson, 217 Ill. 404). But when the inference of negligence necessarily results from the evidence, it becomes a question of law for the court. (Smith v. D. Gen. Ry. Co., 86 Ill. App. 648; Lee v. Chicago City Ry. Co., 127 Ill. App. 510; Langlois v. Chicago City Ry. Co., 141 Ill. App. 439, Patterson v. Chicago City Ry. Co., supra.). Under all the facts in the case at bar as disclosed by the evidence, which was conflicting, we are of the opinion that whether plaintiff was guilty of contributory negligence was a question of

fact to be determined by the jury (Lang v. Chicago City Ry. Co., 181 Ill. App. 654; Chicago Union Traction Co. v. Jacobson, supra; Patterson v. Chicago City Ry. Co., supra.)

Defendant further contends that there was no evidence tending to show any negligence on the part of the defendant, and that the court, therefore, should have peremptorily instructed the jury at the close of all the evidence to find in favor of the defendant. The rule as to when such an instruction should be given is clearly stated in the case of Libby, McNeill & Libby v. Cook, 222 Ill. 206-212, where it is said: "If there is no evidence, or but a scintilla of evidence, tending to prove the material averments of the declaration, the jury should be directed to return a verdict for the defendant. If, however, there is in the record any evidence from which if it stood alone, the jury could, 'without acting unreasonably in the eye of the law,' find that all the material averments of the declaration had been proven, then the cause should be submitted to the jury." In the case at bar the evidence tends to show that, at and prior to the time of the injury, the team was being driven on a fast trot and was not under proper control, and it was conceded by the defendant that the team and wagon were on the "wrong side of the street". In the case of ~~xxxxxxxxxxxxxxxxx~~ Blakleslee's Express Co. v. Ford, ~~xxxxxx~~, 215 Ill. 230, it was held that, while the court would not say that the failure of the defendant to keep on the right side of the street was negligence per se, yet it was a circumstance which tended to prove negligence. We think that under all the circumstances shown by the evidence and in the light of the above rule, the case

was a proper one to submit to the jury.

A further contention is made that the testimony of Dr. Roach, a witness for the plaintiff, was inadmissible, for the reason that it appeared from the doctor's testimony that he first saw the plaintiff on the day of the trial; that he then made an examination of him for the purpose of testifying; that he never knew anything about the case until he made the examination; that "his opinion was based upon subjective examination, notwithstanding the doctor's claim that it was based altogether upon an objective examination," and that the testimony should have been stricken out because based upon a subjective examination. The testimony of the doctor clearly shows that his opinion was based upon objective symptoms. He made a digital examination and found among other things a "depression in front of the angle of the left lower jaw bone," and a "false joint" in the clavicle. It is further urged that what was said between the doctor and plaintiff during the examination was inadmissible. An examination of the record shows that this was brought out by the defendant on cross-examination. The doctor's testimony was properly admitted. City of Chicago v. McNally, 227 Ill. 14; Greinke v. Chicago City Ry. Co. 234 Ill. 564.

The defendant also contends that the court improperly limited the cross-examination of the plaintiff, the complaint being as shown by the record: "Mr. Bohan: How many children have you? A I got three living. Q. What are the ages of the children who are living? The Court: I don't see why you should go into that.

Mr. Behan: If counsel will admit they are not minors -- I would like to have the records show there are no children dependent upon Mr. Larson for support." The court refused to permit further cross-examination and was clearly correct in so doing.

The contention is also made that the court erred in giving instructions Nos. 6 and 9, on behalf of the plaintiff. Instruction No. 6 consisted of three paragraphs. It defined "ordinary care" and "negligence" as used in the instructions, and told the jury that if they believed from the evidence that the plaintiff was injured and sustained damages as alleged in the declaration or some count thereof, "while in the exercise of ordinary care" it was their duty to find a verdict in favor of the plaintiff. The objection is that the instruction "limits the exercise of ordinary care on the part of the plaintiff to the exact time that the collision occurred." The first paragraph of the instruction defined "ordinary care" as "that degree of care which a reasonably prudent or cautious person before and at the time in question would take to avoid the injury under like circumstances." Similar language was used in two different paragraphs of instruction No. 7, so it appears that the jury were instructed that, before the plaintiff could recover, the evidence must show that before and at the time of the injury complained of plaintiff was using ordinary care for his own safety. Furthermore the objection urged to the language "while in the use of ordinary care" is untenable. St. Louis Nat. Stock Yards v. Godfrey, 198 Ill. 488; C. & A. R. R. Co. v. Fisher, 141 Ill. 614; Fusatari v. Kansas City Ry. Co., 166 Ill. App.

578. The same language was used in an instruction and the same contention was made in each of the above cases and in each of them it was held that the language was not subject to the objection now made.

Instruction No. 9, given on behalf of the plaintiff, so far as material, was as follows: "The court instructs the jury that the statute law of the State of Illinois provides that whenever any persons traveling with carriages shall meet on any turnpike, road or any public highway in this state, the persons so meeting shall whenever practicable, seasonably turn their carriages to the right of the beaten track, so as to permit each carriage to pass without interfering or interrupting." This is substantially in the language of the statute, which is designated as the "Law of the Road" 5 J. & A. Statutes, Chap. 121, Sec. 77, pp. 5731-32-34. The objection urged is that the instruction is not applicable to the facts of the case. Conceding that the instruction is bad, yet it is well established that not every erroneous instruction will constitute reversible error. If the instruction tended to mislead the jury, the error in giving it is reversible; but, if, upon examination of the entire record, the reviewing court can see from the nature of the case that it had no such tendency, though improperly given, it will afford no ground of reversal. United States Rolling Stock Co. v. Wilder, 116 Ill. 100; Montague v. People, 141 Ill. 75. The facts in the case as disclosed by the evidence were not complicated, but were simple, and we are of the opinion that the instruc-

tion did not tend to mislead the jury.

The defendant further contends that the court erred in refusing to give instruction No. 15, requested on behalf of the defendant. That instruction told the jury that the preponderance did not lie solely in the greater number of witnesses, but that the greater number of credible witnesses on the one side or the other on any disputed point was proper to be considered in determining the question of preponderance; that in determining the question, the jury might also take into consideration the position of the witnesses at the time of the accident and "everything which appeals to your judgment as affecting the value and reliability of their testimony." In our opinion this instruction was properly refused, for the reason that it was misleading. It enumerated certain things proper to be considered by the jury in determining the matter of the preponderance of the evidence, but did not leave the jury free to consider all the evidence introduced, and all the facts and circumstances in evidence, in determining where the preponderance or greater weight of the evidence lies. (Chicago Union Traction Co. v. Hoppe, 223 Ill. 347; Brisch v. Chicago City Ry. Co., 176 Ill. App. 341; Kiers v. Fuller Co., 176 Ill. App. 49; Smith v. James, 163 Ill. App. 502.) The objection to the instruction in the case at bar, which we have discussed, seems not to have been made in the case of Chicago City Ry. Co. v. Osborne, 1[illegible] Ill. App. 468, cited by defendant.

The defendant next contends that the damages are excessive. The evidence tends to show that the plain-

that did not tend to satisfy the jury.

The defendant further argues that the court erred in refusing to give instructions No. 10, numbered on behalf of the defendant. Your instructions told the jury that for misrepresentations to be of sufficient to be grounds for rescission, they must be material and of such character as to induce the party to act upon it to be material in determining the question of misrepresentations that is determining the question, the jury might also take into consideration the position of the witnesses in the light of the evidence and "everything which concerns the transaction" in the value and relationship of the parties. In the relative fair bargaining and knowledge relative, the one ignorant and the relationship. If misrepresentations relating single proof to be material by the jury in determining the nature of the misrepresentations of the plaintiff and did not leave the jury free to consider all the evidence before deciding and all the circumstances in evidence, in determining their to misrepresentations or fraudulent intent of the material fact. (Citations omitted in Tenney vs. Ga. Pacific, 206 Ill. App. 327; Bennett vs. Chicago Title and Ins. Co., 248 Ill. App. 241; Adams vs. Fairfax Co., 247 Ill. App. 491; Smith vs. Bennett, 148 Ill. App. 148.) The majority of the instructions in the case at bar, which we have discussed, which had to have been made in the view of Illinois Pat. Ins. Co. Tenney, 206 Ill. App. 327, which is dispositive.

The defendants also complain that the evidence was insufficient. The evidence tends to show that the claim

tiff sustained a fracture of the left lower jaw, a fracture of the collar bone, several bruises on different parts of the body, was about ten days in the hospital, and was under treatment for two or three months. At the time of the second trial (more than four years after the accident) neither the collar bone nor the clavicle had united. Plaintiff's face is disfigured, and the doctor testified that in his opinion the condition of the jaw bone and the clavicle is permanent. The case has been submitted to two juries and a verdict for $2,000 was rendered each time in favor of the plaintiff. These verdicts have been approved by the trial judges, and in our opinion substantial justice has been done. The judgment of the Superior Court will therefore be affirmed.

AFFIRMED.

115 - 21080

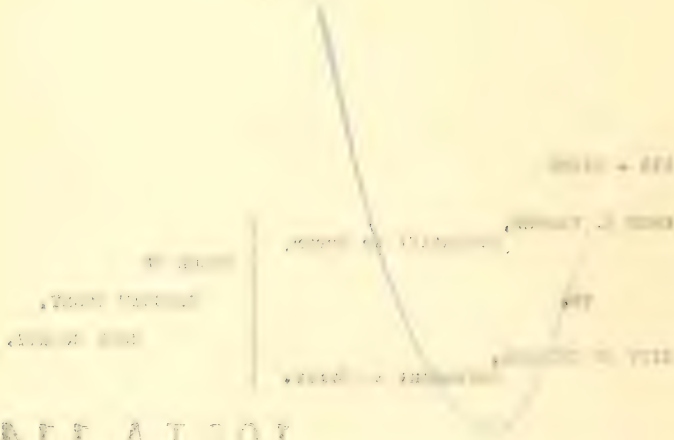
OWEN E. VAUGHN, Plaintiff in Error, vs. CITY OF CHICAGO, Defendant in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

198 I.A. 114

MR. JUSTICE O'CONNOR delivered the opinion of the court:

The writ of error in this case seeks to review the judgment of the Circuit Court of Cook County in sustaining a demurrer to a petition for a writ of mandamus, and dismissing the petition at plaintiff in error's costs. The parties will be designated as petitioner and respondent as in the court below.

The petition alleges, in substance, that respondent is a municipal corporation; that on April 18, 1881, its city council passed an ordinance "which created an executive department, * * * known as the police department which embraced and created * * * positions or employment of patrolmen and other employees as may be provided by ordinance;" that owing to the growth of the respondent it became necessary to employ carpenters to remodel and build police stations, etc.; that each year the city council passed an annual appropriation ordinance, appropriating money with which to pay ten carpenters to be employed in the police department; that the position or employment of carpenter in the police



department was regularly classified by the Civil Service Commission; that for more than two years section 1908 of The Chicago Code of 1911 was in force and effect in the City of Chicago; that "said section created various offices of the police department,* * * and created such other employees as the city council in its annual appropriation ordinances hereinafter provide for;" that by ordinances the council appropriated money for the payment of six carpenters; that the petitioner took the civil service examination for carpenter of the police department, duly passed and qualified for such position, and entered upon his duties as such, June 20, 1896; that in 1914, the petitioner sued the respondent in the Municipal Court of Chicago for salary or wages due and owing to him prior to November 28, 1913, setting up the foregoing facts; that said court "adjudicated that petitioner * * * was entitled to recover because of the existence of said facts as heretofore alleged herein and respondent herein is by the said judgment of the Municipal Court as aforesaid estopped from denying or disputing the foregoing facts;" that petitioner has not violated any law or ordinance prescribed by respondent or by the civil service act; that November 13, 1913, the superintendent of police filed charges against the petitioner with the Civil Service Commission; that said charges were set for hearing November 26, 1913, before "the police trial board, which trial board consisted of civil service commissioners, Flynn and Lower, and one German F. Schuettler, First Deputy Superintendent of Police;" that said board was constituted in accordance with the rules and regulations of the Commission; that the petitioner and his counsel were present at the time and place mentioned for said hearing, and thereupon the matter was continued until November

28, 1913, at which time petitioner and his attorney again appeared before the board; that commissioners Flynn and Lower were present at the beginning of the trial; that said Schuettler appeared before all the evidence was heard and sat as a part of the board until the end of the trial; that after the hearing was concluded, the board took the case under advisement; "that said trial board has not yet made any findings or reported its findings to the Civil Service Commission;" that the minutes of the Commission of November 28, 1913, state that the charges were heard by the Civil Service Commission on that date, and that the Commission found the petitioner guilty and ordered that he be removed from the service of the city; that such order was void in that the case was heard by the trial board; "that the Civil Service Commission as a commission, did not hear the charges;" that the petitioner made demand for reinstatement which was refused; that "no ordinance was ever passed by the respondent which in exact words creates the position or employment of carpenter." The petition was afterwards amended. A demurrer was sustained, and the petition as amended was dismissed at petitioner's costs. This writ of error followed.

The petitioner contends that (1) he has shown by his petition the legal existence of the office or position of carpenter of the police department; that he is entitled thereto, as he was illegally discharged by the Civil Service Commission, the argument being that as the case was heard before the police trial board, that board should have reported to the Civil Service Commission before said Commission could legally enter an order discharging him;

and (2) the judgment entered by the Municipal Court, wherein he was awarded his salary or wages as carpenter is res adjudicata of the legal existence of the office or position and his rights thereto.

A person seeking reinstatement by a writ of mandamus must show the legal existence of the office or position, his clear right to the office, and the duty on the part of the respondents to perform the act sought to be enforced. Kern v. Mayer, 214 Ill. 40; Mullis v. City of Chicago, 235 Ill. 472 Gersch v. City of Chicago, 259 Ill. 551; Hickland v. City of Chicago, No. 20699, Appellate Court, First Dist.; Flynn v. City of Chicago, No. 20641, id. All allegations in the petition that are well pleaded are admitted by the demurrer. Mere conclusions of the pleader, however, are not so admitted. The petition avers that the city council passed an ordinance "which created an executive department * * * known as the police department" and which created such other positions or employment "as may be provided by ordinance." The respondent contends that the office or position to which he seeks reinstatement is created by ordinance, and as it was necessary to establish the legal existence of the office or position, this could be done only by pleading the ordinances relied upon. Whether such ordinances created the office or position was a question of law. The petitioner did not set up the provisions of the ordinances nor the substance thereof, but simply his conclusions that the office or position was established by the ordinances. The petition was clearly demurrable. Quinn v. City of Chicago, 176 Ill. App. 115; City of Chicago v. Gray, 216 Ill. 84;

Kennally v. City of Chicago, 220 Ill. 465.

The petitioner contends that the order removing him from the service of the city is void, the argument being that the evidence to sustain the charges filed against him before the Civil Service Commission was heard by a trial board consisting of three members, two of whom were civil service commissioners, but that in the hearing of said evidence, the three were sitting as a trial board, and none of them was sitting as commissioner. Practically this same contention was made in the case of Ellfeldt v. City of Chicago, 189 Ill. App. 610, where it was held that the contention was opposed to both reason and authority; that the civil service act was not intended to be interpreted in any such narrow fashion. Also the civil service act provides, Sec. 1, that two of the civil service commissioners shall constitute a quorum; Sec. 12 of the same act provides that no officer or employe in the classified civil service shall be discharged except upon written charges after hearing; that said charges shall be investigated by the Civil Service Commission, or some other officer or board appointed by the Commission; that the finding or decision of the civil service commissioner or investigating board, when approved by the Commission, shall be certified to the appointing officer. In the case at bar, two members of the trial board were civil service commissioners, and it would be an absurdity to say that they should report to themselves. Ellfeldt v. City of Chicago, supra; Thomas v. Citizens Horse Ry. Co., 104 Ill. 462; Lawrence v. Traner, 136 Ill. 474. The contention of the petitioner is untenable.

Immunity to Acts of Congress, 60 Ill. 626.

The principal contention in our case involving the issue now under consideration is not in doubt, but appears being that the exclusive of municipal or county filed against the subject the 1921 Income Tax Law was made by a local board consisting of three members, two of whom were state officers nonresidents, not born on the premises of such corporation, the board were sitting as a local board, and none of them was sitting as nonresidents. Practically this same proposition was made in the case of United States v. Cooke, 117 Ill. 116, 120, 121, where it was held that the municipal corporation is only a creature and subject; that the civil officers are not authorized to be interpreted by an act passed in the state senate function. The civil service act provides, sec. 1, that the of the civil service commission shall consists of members; sec. 12 of the same act provides that in addition to officers in the classified civil service, shall be included municipal and county officers. Counsel argue that such statutory provisions, or some other effect as to municipal officers by the Government, inasmuch as the creation of the civil service commission or immunities, there is certainly the constitutional affirmative. In the view of the, the members of the local board were state officers nonresidents, and it would be an unwarrantable to say that long service family of Congressmen. Alfred v. Burnet Bayer Income v. Gilmore Bates 60.-, 1 Ill. 1960 Immunity to Income, 116 Ill. 626. The immunity of the operations immunity.

The further contention of the petitioner that the judgment entered in his favor by the Municipal Court for salary prior to November 28, 1913, is res adjudicata of the legal existence of the office or position he is now seeking and his right thereto, cannot be maintained. For aught that appears from the petition, the judgment in that case may have been rendered upon the ground that the petitioner had performed the services for which he was seeking pay. Furthermore, we have this day reversed said judgment of the Municipal Court. We have carefully examined the record and are of the opinion that the demurrer was properly sustained, and the petition as amended dismissed.

The judgment of the Circuit Court of Cook County will, therefore, be affirmed.

AFFIRMED.

246 - 21227

PETER CRISTOFANO and VINCENT DI CICCO, for use of Peter Christofano, Defendants in Error, vs. WILLIAM ANTON and JAMES ANTON, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out by James Anton to reverse a judgment for $158.85 entered by the Municipal Court of Chicago against him and William Anton. On March 11, 1915, on motion of defendants in error (plaintiffs), the statement of facts contained in the transcript of the record was stricken therefrom, and the alleged grounds for reversal are based upon the common law record.

The action in the Municipal Court was against William, Nick and James Anton, doing business as Anton Bros., defendants, and only William Anton and James Anton were served with process. Plaintiffs' claim was for the sum of $158.85 upon an account stated and for merchandise sold and delivered. It appears from the summons that the defendants were directed to appear in the Municipal Court on a certain named day to answer unto "Peter Christofano." James Anton entered his appearance and filed an affidavit of merits in which he denied that he, individually or jointly with his co-defendants, had ever purchased any merchandise from plaintiffs, or had ever stated an account with plaintiffs. William Anton did not appear and was defaulted. The court found the issues in favor of plaintiffs, assessed plaintiffs' damages at the sum of $158.85, and entered judgment against William Anton and James

246 - 21207

BRUNO GUIDO DEVARE and VINCENT DE GIOCO, for use of Peter Christofemo,

Defendants in Error,

vs.

WILLIAM ANTON and JAMES ANTON,

Plaintiffs in Error.

ERROR TO

SUPERIOR COURT

OF CHICAGO.

1913 JA. 15

Mr. Presiding Justice Barton delivered the opinion of the court:

This writ of error was sued out by James An on to reverse a judgment for $158.85 entered by the municipal court of Chicago against him and William Anton. On March 12, 1913, on motion of defendants in error (plaintiffs), the statement of facts contained in the transcript of the record was stricken therefrom, and the alleged grounds for reversal are based upon the common law record.

The action in the municipal court was against William, Nick and James Anton, doing business as Anton Bros., defendants, and only William Anton and James Anton were served with process. Plaintiffs' claim was for the sum of $158.85 upon an account stated and for merchandise sold and delivered. It appears from the summons that the defendants were directed to appear in the municipal court on a certain named day to answer unto "Peter Christofemo." James Anton entered his appearance and filed an affidavit of merits in which he denied that he, individually or jointly with his co-defendants, had ever purchased any merchandise from plaintiffs, or had ever dealt or account with plaintiffs. William Anton did not appear and was defaulted. The court found the issues in favor of plaintiffs, assessed plaintiffs' damages at the sum of $158.85, and entered judgment against William Anton and James

Anton on the finding.

Some of the points relied upon for a reversal of the judgment by counsel for James Anton are, in our opinion, hypercritical and without merit. The trial court certainly had a right to enter judgment against the two defendants, William and James Anton, notwithstanding the fact that their co-defendant, Mick Anton, was not served with process. (Sec. 14 Practice Act.) It is urged that there is a variance between the statement of claim and the summons, in that it appears from the former that the plaintiffs were "Peter Cristofano and Vincent Di Cicco, for use of Peter Christofano," whilst in the latter the defendants were directed to appear and answer unto "Peter Christofano." James Anton is in no position to complain of this. He did not raise the point in an appropriate manner in the trial court. He appeared and filed an affidavit of merits. After the finding he could not take advantage of the variance, if such there was, on a motion in arrest of judgment (Toledo, W. & W. Ry. Co. v. McLaughlin, 63 Ill. 389, 391); nor can he on a writ of error (Cruikshank v. Brown, 5 Gilm. 75, 77). The judgment is affirmed.

AFFIRMED.

Action on the Finding.

None of the points relied upon for a reversal of the judgment by counsel for James Anton are, in our opinion, hypercritical and without merit. The trial court certainly had a right to enter judgment against the two defendants, William and James Anton, notwithstanding the fact that their co-defendant, Rick Anton, was not served with process. (Ga. 14 Practice 245.) It is urged that there is a variance between the statement of claim and the summons, in that it appears from the former that the plaintiffs were "Peter Cristofano and Lorenzo Cristofano, for use of Peter Cristofano," while in the latter the co-plaintiffs were directed to appear and answer unto "Peter Cristofano." Same claim is in no position to complain of this. He did not raise the point in an appropriate manner in the trial court. He appeared and filed an affidavit of merits. After the finding he could not take advantage of the variance, if such there was, on a motion in arrest of judgment (Code, § 6-1-1. M. Ga. v. Glenn, 65 Ga. 500, 501); nor can he on a writ of error (Trainham v. Brown, 5 Ga. App. 72). The judgment is affirmed.

AFFIRMED.

257 - 21239

NATE H. EHRLICH,
Defendant in Error,

vs.

LAKESIDE FISH and OYSTER COMPANY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 152

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced this action to recover the sum of $375.02 for two consignments of fish sold and delivered to defendant in December, 1913. At the beginning of the trial the attorney for defendant admitted that defendant had received the fish and that the number of pounds charged for was correct, and stated in substance that the only question in the case was whether plaintiff was the vendor of the fish or plaintiff's parents, M. Ehrlich and Fannie Ehrlich; in other words, whether immediately prior to the sale and delivery plaintiff was the owner thereof or plaintiff's parents. Thereupon the court suggested that this issue had better be determined by a jury, and the trial proceeded before a jury. At the conclusion of the hearing of the evidence the court charged the jury orally, in part as follows:

"The plaintiff in his statement of claim in this suit is asking for $375, the fish shipped on two consignments. The defendant denies that the fish was bought from this plaintiff. The question for you to decide is whether or not under the evidence the fish belonged to the plaintiff, or was the plaintiff acting as the agent for his parents and the title of the fish was in the parents and not in this young man. * * Even though the fish might be his, nevertheless if he represented that the fish belonged to the father or the parents then, under that phase of the case if you should find it, you would have to find for the defendant."

At the conclusion of the charge, in response to the court's inquiry, the attorney for defendant stated that he had

hereinafter

~~no objection to the charge.~~ The jury returned a verdict in favor of plaintiff and assessed his damages at the sum of $375.02, upon which verdict the court entered judgment against the defendant.

Plaintiff testified in substance that he was 23 years of age and resided at La Crosse, Wisconsin, and was engaged in the business of buying and selling fish and had been for three years; that his father and mother, as partners, were also engaged in the fish business but that he had had no business connection with them for three years; that he was the owner of the fish in question and sold them to defendant on his own account and not as agent for his parents; that on December 1, 1913, he called at the office of the defendant in Chicago and had an interview with Benjamin Sacks, president of defendant, and at that time Sacks ordered the fish to be shipped; that subsequently he had another interview with Sacks at which time it was determined that the value of the fish received by defendant was $375.02; that thereupon Sacks said to him: "I will give you a check for $75.02; your father owes me $300 and I am going to take it off"; that he (plaintiff) replied: "You cannot take off one cent from me, the fish were mine and I want my money"; that thereupon Sacks suggested that the matter could only be settled by suit, and that he (plaintiff) shortly thereafter commenced the present action. Fannie Ehrlich, mother of plaintiff, testified that she and her husband, Meyer Ehrlich, were partners in the fish business and that plaintiff had not been in their employ for three years.

For the defendant Sacks testified in substance that on December 1, 1913, plaintiff called on him and said that his parents had certain fish they wanted to sell and inquired if defendant would buy them, and further stated that his mother was then at Brownsville, Minnesota, where some of the

No objection to the on ore. The jury returned a verdict in favor of plaintiff and assessed his damages at the sum of $275.00, upon which verdict the court entered judgment against the defendant.

Plaintiff testified in substance that he was 38 years of age and resided at La Crosse, Wisconsin, and was engaged in the business of buying and selling fish and had been for three years; that his father and mother, as partners, were also engaged in the fish business but that he had no business connection with them for three years; that he was the owner of the fish in question and sold them to defendant on his own account and not as agent for his parents; that on December 1, 1912, he called at the office of the defendant in Chicago and had an interview with Theodore Jacobs, president of defendant, and at that time Jacobs ordered the fish to be shipped; that subsequently he had another interview with Jacobs at which time it was determined that the value of the fish received by defendant was $275.00; that Stevenson Jacobs said to him: "I will give you a check for $275.00; your father owes me $600 and I am going to take it off"; that he (plaintiff) replied: "You cannot take off one cent from me, the fish were mine and I want my money"; that Stevenson Jacobs suggested that the matter could only be settled by suit, and that he (plaintiff) shortly thereafter commenced the present action. Fannie Durian, mother of plaintiff, testified that she and her husband, Roger Durian, were partners in the fish business and that plaintiff had not been in their employ for three years.

For the defendant Jacobs testified in substance that on December 1, 1912, plaintiff called on him and said that his parents had certain fish they wanted to sell and inquired if defendant would buy them, and further stated that his

fish were, and that he (Sacks) had better telephone her and arrange with her as to price, etc.; that he (Sacks) on the same day talked with Mrs. Ehrlich over the long distance phone, and that subsequently the fish were received by defendant; that at the time of the interview with plaintiff defendant had in its possession two demand notes, each for $150, signed by Fannie and Meyer Ehrlich and payable to defendant, and so advised plaintiff; and that he (Sacks) during his long distance telephone conversation with Fannie Ehrlich told her that defendant would credit the value of the fish to be shipped on said notes. Fannie Ehrlich denied that while she was at Brownsville on December 1st she had any telephone conversation with Sacks. The latter further testified that after the fish had been received by defendant, plaintiff again called and demanded that payment for the fish be made to him, which demand was refused, and that he (Sacks) did not then tender to plaintiff a check for $375.02, or for any amount, in settlement. Meyer Finder, treasurer of defendant, and Morris Kaipe, bookkeeper for defendant, also gave certain testimony on behalf of defendant, as did Henry Johnson, a dealer in fish in Chicago.

It is first contended by counsel for defendant that, even upon the theory that plaintiff was the owner of the fish, plaintiff's evidence does not warrant a verdict and judgment in excess of $44.72. We cannot agree with counsel. Under the pleadings and the admissions made by the attorney for defendant during the trial, the value of the fish ($375.02) received by defendant was not in dispute. The sole issue presented to the jury was whether at the time of the sale plaintiff was the owner of the fish and sold them to defendant for his own account, or whether plaintiff's parents were the owners thereof and plaintiff acted merely as agent for them in making the sale. "In the trial of a cause the admissions of counsel, as to matters to be

fish were, and that he (Banks) had better telephone her and arrange with her as to price, etc.; that he (Banks) on the same day talked with Mr. Hurlich over the long distance phone, and that subsequently the fish were received by defendant; that at the time of the interview with plaintiff defendant had in its possession two demand notes, each for $150, signed by Banks and Mayer Hurlich and payable to defendant, and so advised plaintiff; and that he (Banks) during his long distance telephone conversation with Mrs. Hurlich told her that defendant would credit the price of the fish to be shipped on said notes. Mrs. Hurlich testified that while she was at Greenville on December 1st she had my telephone conversation with Banks. The latter further testified that after the fish had been received by defendant, plaintiff again called and demanded that payment for the fish be made to him, which demand was refused, and that he (Banks) did not then tender to plaintiff a check for $75.00, or for any amount, in settlement. Meyer Hurlich, treasurer of defendant, and Morris Cohen, bookkeeper for defendant, also gave certain testimony on behalf of defendant, as did Harry Johnson, a dealer in fish in Chicago.

It is first contended by counsel for defendant that, even upon the theory that plaintiff was the owner of the fish, plaintiff's evidence does not warrant a verdict and judgment in excess of $61.72. We cannot agree with counsel. Under the pleadings and the admissions made by the attorney for defendant during the trial, the value of the fish ($232.00) received by defendant was not in dispute. The sole issue presented to the jury was whether at the time of the sale plaintiff was the owner of the fish and said them to defendant for his own account, or whether plaintiff's parents were the owners thereof and plaintiff acted merely as agent for them in making the sale. "In the trial of a cause the admissions of counsel, as to matters to be

proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." (Oscanyan v. Arms Co., 103 U. S. 261, 263; Wilson v. Spring, 64 Ill. 14; Hill Construction Co., v. Chicago R. I. & P. Ry. Co., 174 Ill. App. 600.)

And we cannot say after due consideration of the record before us that the verdict is contrary to the weight of the evidence, as contended by counsel, on the question whether or not plaintiff was the owner of the fish at the time of the sale.

It is further contended by counsel that the trial court erred in refusing to admit in evidence the book accounts of defendant and certain entries made in defendant's books relative to the sale in question. If certain entries in the account books of defendant showed that the purchase of the fish in question was from plaintiff's parents or from Meyer Ehrlich, rather than from plaintiff, said entries would not be competent evidence against plaintiff. The defendant could not bind plaintiff by any statements written in a book of account kept by defendant. We think that the ruling of the court was a proper one. (Sanford v. Miller, 19 Ill. App. 536; Summers v. M'Kim, 12 Serg. & Rawle Rep. (Pa.), 405, 411; Dailey v. Sonnerborn, 35 Tex. 60, 62.) In the case last cited it is said: "Perhaps the strongest reason why the purchaser's books should not be admitted as against the seller, consists in the fact that it would be an additional inducement to dishonesty and fraud, which would thereby place the merchant, or seller, in the power of his debtor."

Complaint is made of several other rulings of the

proved, and consistently received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made on the self-evident. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the otherwise proof." (Duncanson v. Jaques Jo., 124 U. S. 581, 588; Wilson v. Sullivan, 14 Ill. App. 3d 1, 2 Ill. Dec. 1, 4; Jackson M. I. & P. Ry. Co., 194 Ill. App. 604.)

And we cannot say after due consideration of the record before us that the verdict is contrary to the weight of the evidence, as considered by counsel, on the question whether or not plaintiff was the owner of the item at the time of the suit.

It is further contended by counsel that the trial court erred in refusing to admit in evidence the book accounts of defendant and certain entries made in memorandum books relative to the sale in question. If certain entries in the account books of defendant proved that the purchase of the item in question was from plaintiff's portals or from Joyce Griffith, rather than from plaintiff, such entries would not be competent evidence against plaintiff. The defendants could not bind plaintiff by any statements taken in a book of account kept by defendants. We think that the ruling of the court was a proper one. (Goodrich v. Miller, 19 Ill. App. 556; Dunderdale v. Kirk, 14 Iowa 549. Iowa Sup. (Ga.), 456, 461; Bailey v. Cunningham, 38 Iowa, 65, 68.) In the case last cited it is said: "Perhaps the strongest reason why the purchaser's books should not be admitted as against the seller, consists in the fact that it would be an additional inducement to dishonesty and fraud, which could thereby place the merchant, or seller, in the power of his debtor."

court on the admissibility of evidence, but we do not think that any error prejudicial to the defendant was committed.

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

court on the admissibility of evidence, but we do not think that any error prejudicial to the defendant was committed.

Finding no reversible error in the record the judgment of the municipal court is affirmed.

AFFIRMED.

211 - 21189

JAMES CLINE, doing business as J. & D. CLINE, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
vs.	
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.	

198 I.A. 163

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for damages to his automobile-truck and the goods it contained resulting from a collision with appellant's locomotive engine at a public crossing. The negligence charged in the declaration was the running of said engine across said highway "without causing a bell to be rung or a steam whistle to be whistled at a distance of 80 rods from said crossing, and without causing a bell to be kept ringing or a steam whistle to be kept whistling, while said locomotive engine was approaching said crossing from 80 rods therefrom until it had reached the same."

Appellant contends there should have been a directed verdict in its favor on the grounds that the evidence does not disclose the negligence charged and shows contributory negligence.

At said crossing the railroad tracks are double and its right of way is 100 feet wide, running about north and south at right angles to the highway. At the time of the collision the locomotive engine, drawing three cars, was northbound on the easterly track and appellee was going east. The latter and his chauffeur who operated the automobile testified that though they looked they did not see

FRANK CLINE, doing business as L. & D. CLINE,
Appellee,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
COOK COUNTY.

MR. JUSTICE FRANK DELIMATER THE OPINION OF THE COURT.

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Appellant contends there should have been a directed verdict in its favor on the grounds that the evidence does not disclose the negligence charged and show contributory negligence.

At said crossing the railroad tracks are double and its right of way is 100 feet wide, running about north and south at right angles to the highway. At the time of the collision the locomotive engine, drawing three cars, was northbound on the southerly track and appellee was going east. The latter and his chauffeur who operated the automobile testified that though they looked they did not see

the locomotive until they were on the westerly tracks when they jumped permitting it to continue under power and collide with the engine. They also testified that they heard no whistle or bell or gong.

The uncontroverted evidence as to the physical conditions clearly shows, however, that had appellee looked when the exercise of due care to avoid danger under such circumstances manifestly required him to look he could have seen the approaching train in time to avert a collision. Nor did the weight of the evidence authorize a verdict on the theory that no bell was rung nor whistle blown.

As to ability to see the approaching train the evidence shows: At a distance of from 30 to 40 feet west of the easterly track there was an unobstructed view of the tracks south to beyond a curve estimated from one quarter to one half a mile from the crossing. Judging from a photograph in evidence it was nearer one half mile. At the south west corner of the junction of the highway and appellant's right of way on the lot of one Bleimehl, where there was a saloon, were bushes which for a distance along the approach to the right of way obstructed a view of the track to the south. The actual distance from the west line of the right of way to the easterly track was 47 feet and 8 inches. Whether or how much the bushes may have hung over the line does not appear. Their estimated distance from the track was from 20 to 45 feet. Cline 'judged' about 20 feet and Bleimehl's brother about 25. The chauffeur said he could not see the track until within 10 feet of it. But their testimony does not conform to a plat made to a scale and a photograph showing actual conditions, as testified to by several witnesses. The testimony of three witnesses who had lived there for several years and crossed the tracks daily placed the distance

the locomotive until they were on the westerly tracks when they jumped permitting it to continue under power and collide with the engine. They also testified that they heard no whistle or bell or gong.

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As to ability to see the approaching train the evidence shows: At a distance of from 30 to 40 feet west of the easterly track there was an unobstructed view of the tracks south to beyond a curve estimated from one quarter to one half a mile from the crossing. Judging from a photograph in evidence it was nearer one half mile. At the south west corner of the junction of the highway and appellant's right of way on the lot of one Blomenkamp, where there was a saloon, were bushes which for a distance along the approach to the right of way obstructed a view of the track to the south. The actual distance from the west line of the right of way to the easterly track was 47 feet and 8 inches. Whether or how much the bushes may have hung over the line does not appear. Their estimated distance from the track was from 20 to 45 feet. Witnesses 'judged' about 80 feet and Blomenkamp's brother about 25. The chauffeur said he could not see the track until within 10 feet of it. But their testimony does not conform to a plat made to a scale and a photograph showing actual conditions, as testified to by several witnesses. The testimony of three witnesses who had lived there for several years and crossed the tracks daily placed the distance

from 30 to 45 feet. One said "all of 30 feet," the other two 35 to 40. Their testimony is consistent with every other part of the record showing that within that distance there was an unobstructed view of the tracks south for nearly if not quite one half mile. The chauffeur said he could have stopped the truck within 10 feet. Hence, with such a view of an approaching train there was apparently no necessity of a collision. Entering into the situation somewhat is the question of speed. The truck was going from 7 to 10 miles an hour. As to the speed of the train the testimony again varies. Bleimehl said "40 or 50 miles per hour" and Cline "35 or 40," and the engineer 12 or 14. Whatever the speed it does not enter into the question of negligence in this case nor affect materially the question of timely opportunity to avoid the collision; for if the train did not get in sight until after the truck had passed the bushes/~~it~~ the truck unquestionably could have gone over the 30 to 40 feet before the train got there, and if it was in sight then it could have been seen in plenty of time to have stopped the truck before reaching even the westerly track. Whatever its speed the train was unquestionably in sight when the truck passed the bushes. Assuming it was going at the rate of speed testified to by Cline - five times as fast as the truck, then it had only 150 to 200 feet to go when plaintiff reached the point 30 to 40 feet away.

They knew they were approaching a railroad crossing and of the danger. Each said he was looking in both directions. Each claimed he did not see the train until the truck was on the western track. The physical facts were such that the train could have been seen after reaching a point 30 to 40 feet west of the point of collision. The truck could have been stopped within 10 feet. Hence, we are driven to the conclusion reached in a similar case (C. P. & St. L. Ry. Co. v. De Freitas, 109 Ill. App. 104) that they "either looked as they say they did and saw the train approach

ing, and attempted to cross in front of it, or that they did not look." In that case it was said also: "The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the view was unobstructed and where if he had properly exercised his sight he must have seen it." (106.) (See also, C. & A. R. R. Co. v. Vreimeister, 112 Ill. App. 146; Kennedy v. A. G. & St. L. Tr. Co., 180 id. 146.) In the language of the last decision: "The uncontroverted facts carry us to the inevitable conclusion to which all reasonable minds must arrive that the driver * * * by his conduct in attempting to cross the tracks at the time and in the manner that he did was guilty of negligence which contributed to the injury complained of and the established rule of law operates as a bar to any recovery in the case." (p. 149.)

As to the negligence charged in the declaration three witnesses on each side testified directly on the subject. Those for plaintiff - himself, his chauffeur, and Bleimehl's brother, said they heard no whistle or bell and none was sounded. But the record discloses reasons why they would not have heard them. One alone is sufficient to mention, - the noise made by the loaded truck. ~~It is admitted the~~ The muffler of the automobile was open. One witness a block and a half west while doing his chores was attracted to the truck's passing by its "terrible noise." Another whom it passed within a half block of the tracks described its noise as unusual, "like an old threshing machine." He however heard the train and its whistle though he could not see the train, while stopping for the truck to come up and pass him and was anticipating whether the truck would stop. Under such conditions the negative testimony of those on the truck and of Bleimehl, whom it passed while engaged in sweeping in front of the saloon, can not be taken in preference to the affirmative testimony of three witnesses

ing, not attempted to cross in front of it, or that they did not look." In that case it was held also: "The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the view was unobstructed and there if he had properly exercised his sight he must have seen it." (1)(a.) (See also, 2. R. R. 2. 2d. 7. Trainmaster, 121 Ill. App. 3d; Gaudet v. R. R. R. R. R. 2d. 2d. 2d. 2d.) In the language of the last decision: "To nonsuit or direct a verdict for defendant the inevitable conclusion in order that it reasonable minds must arrive that the driver of a car by his conduct in attempting to cross the tracks at his time and in the manner that he did was guilty of negligence which contributes to the injury complained of and the probabilities pro of has no reason to be any reasonably in the case." (a. 1a.)

As to the negligence charged in the declaration three witnesses on each side testified directly on the subject. There for plaintiff - Stewart, the conductor, and Schmidt's brother, said they heard no whistle or bell and were not crossing. But the record discloses reasons why they would not have heard them. One alone is sufficient to convince - the noise made by the loaded truck. It is admitted the traffic was great. One witness a block and a half away said while being his stopped was attracted to the truck's passing by its "terrible noise." Another when it passed within a half block of the truck described its noise as unusual, "like an old threshing machine." He however heard the train and its whistle though he could not see the train, while standing for the truck to come up and pass him and was actually closer the truck would step. Under such conditions the slightest inadvertency to hear on the track and of Stewart, when it passed this occupied in reading in front of the cabin, and all in some an preference to the affirmative testimony of three witnesses

including the engineer that the whistle was blown. The engineer testified that the fireman was continuously ringing the bell from 80 rods south where he blew the whistle and which he repeated within 400 feet of the crossing. The fireman was not a witness being at the time in the regular army in the East. But two other witnesses, ~~who apparently could have no special motive in so testifying, if not true,~~ confirmed the engineer's testimony as to the whistling. One was on the tracks 400 feet north of the crossing going south, the other within one half block of the tracks on the highway going east. Both of them also heard the gong at the crossing sounding, but could not say whether the bell was ringing or not. "The rule as laid down by the courts in this state is that positive evidence as to the fact that a bell was ringing or a whistle sounded, is entitled to more weight than negative evidence in relation to said fact." (C. R. I. & P. Ry. v. Jones, 135 Ill. App. 380 and cases cited p. 385; also Ry. Co. v. Ryan, 80 Ill. 528; I. C. R. Co. v. Dickson, 88 id. 431; C. R. R. Co. v. Robinson, 106 id. 145.) This rule must be given force whenever, as in this case, the situation for hearing is less favorable to those who testify on the negative side of the question. Presumably if they could not hear the sharp whistle they could not hear the bell.

We think, therefore, that the verdict is clearly against the weight of the evidence both on the question of negligence and that of contributory negligence, and that pursuant to a long line of decisions in similar cases the judgment must be reversed with a finding of fact.

REVERSED.

including the engineer that the whistle was blown. The engineer testifies that the fireman was unanimously ringing the bell from 80 rods south where he blew the whistle and which he repeated within 100 feet of the crossing. The fireman was not a witness being at the time in the engine room in the boat. But two other witnesses, who apparently could have no special motive in so testifying, if not true, confirmed the engineer's testimony as to the whistling. One was on the tracks 400 feet north of the crossing going south, the other within one half block of the tracks on the highway going west. Both of them also heard the ring of the crossing signal, but could not say whether the bell was ringing or not. The rule as laid down by the courts in this state in this positive evidence as to the fact that a bell was ringing or a whistle sounded, is entitled to more weight than negative evidence to relation to said fact." (C. B. I. & P. Ry. v. Jones, 149 Ill. 361, 366 and cases cited; see Ry. Co. v. Mowe, 80 Ill. 568; L. & N. Co. v. Malone, 86 id. 444; C. I. Co. v. Robinson, 108 id. 146.) This rule must be given force wherever, as in this case, the attention for hearing is less favorable to those who testify on the negative side of the question. Presumably if they could not hear the ringing whistle they could not hear the bell.

We think, therefore, that the verdict is clearly against the weight of the evidence both on the question of negligence and that of contributory negligence, and that pursuant to a long line of decisions in similar cases the judgment must be reversed with a finding of fact.

REVERSED.

211 - 21189

FINDING OF FACT.

We find that appellee, Chicago, Milwaukee & St. Paul Railway Company, was not guilty of negligence as charged in the declaration, and that appellant, James Cline, was guilty of contributory negligence.

225 - 21203

FRANK GIBIS,
Defendant in Error,

vs.

WALLACE C. ABBOTT, et al.,
Plaintiffs in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

198 I.A. 167

MR. JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT.

Defendant in error filed his bill of complaint to wind up and dissolve a corporation, The Abbott Press, under Section 25, Ch. 32 of the revised statutes. A receiver was appointed to take possession of its assets to whom the corporation, its officers, agents, etc., were directed to surrender them. The bill charged among other things that the O'Donnell Bromley Co., a corporation, was in possession of assets belonging to The Abbott Press, and had acquired such possession through fraudulent transfers without consideration, on which issue was taken by answer.

Later the receiver filed a report and petition reiterating the charge and alleging a demand on and failure by said O'Donnell Bromley Co. and other defendants to turn over such assets, and asked that they be directed so to do, and in default thereof to show cause why they should not be punished for contempt.

The matter coming on to be heard on said petition and a joint answer thereto, and the sworn pleadings in the case as evidence, the court entered an order finding that The Abbott Press transferred all of its assets save its franchise to said O'Donnell Bromley Co. through another defendant, Jeremiah J. O'Donnell, without any consideration, and also containing the following finding: "That it is

THE KING,
Defendant in error,

vs.

WILLIAM C. [illegible], et al.,
Plaintiffs in error.

ERROR TO
[illegible] COURT,
COOK COUNTY.

1931.A.107

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

Defendant in error filed his bill of complaint to wind up and dissolve a corporation, The Abbott Press, under Section 29, ch. 32 of the revised statutes. A receiver was appointed to take possession of its assets to wind up the corporation, its affairs, assets, etc., were directed to surrender them. The bill charged among other things that the O'Donnell Armoury Co., a corporation, was in possession of assets belonging to The Abbott Press, and had acquired such possession through fraudulent transfers without consideration, on which issue was taken by answer.

Later the receiver filed a report and petition relegating the charge and alleging a demand on and failure by said O'Donnell Armoury Co. and other defendants to turn over such assets, and asked that they be directed so to do, and in default thereof to show cause why they should not be punished for contempt.

The matter coming on to be heard on said petition and a joint answer thereto, and the entire pleadings in the case as evidence, the court entered an order finding that The Abbott Press transferred all of its assets save its franchise to said O'Donnell Armoury Co. Certain matters [illegible], O'Donnell, without any consideration, and also contained the following finding: "That it is

for the best interest of all the parties to this suit that the said assets should be taken into the custody of this court during the pendency of this suit and preserved until the final determination of the issues herein"; and the order directed, that respondents turn over to the receiver such assets so transferred as was in their possession or under their control.

This writ of error is sued out to review such order. A motion to dismiss the same on the ground that the order is not final and a writ will not therefore lie, was without full consideration thereof reserved to the hearing.

We can not agree with the contention of plaintiff in error that the order is final or an adjudication of the rights of the parties to the suit to the property in question. On the contrary it merely contemplated, as the language quoted therefrom indicates, the placing of the property in custodia legis until the issues raised, including the right thereto, were finally determined in the regular way.

It not being a final order, the writ was improvidently granted and must be dismissed.

WRIT DISMISSED.

for the best interest of all the parties to this suit that the said assets should be taken into the custody of this court during the pendency of this suit and preserved until the final determination of the issues herein"; and the order directed, inter representants some part in the receiver such assets as instructed in his ex thereto possession in some safe place.

This suit of mover is just put in proper procedural order. A motion to dismiss the same on the ground that the order is not final and a writ will not therefore lie, was without full consideration thereof received in the instant.

We can not agree with the contention of plaintiff in error that the order is final or an adjudication of the rights of the parties to the suit as to the property in question. On the contrary it merely contemplated, as the language quoted therefrom indicates, the placing of the property in custodia legis until the issues raised, including the right thereto, were finally determined in the regular suit.

Is not being a final order, the writ was improvidently granted and must be dismissed.

WRIT DISMISSED.

241 - 21222

JAMES F. PORTER,
Defendant in Error,

vs.

JOE COHN, LEO LIEBERMAN and
JEROME STIEFEL, doing business
as COHN, LIEBERMAN & STIEFEL,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 169

MR. JUSTICE BAUERS DELIVERED THE OPINION OF THE COURT.

Porter was the assignee of a written lease of certain premises from one Pope to ~~plaintiffs in error~~ defendants, a copartnership. About three months after its execution the partnership was dissolved, and its business was sold to Cohn & Levin Cloak and Suit Co., which continued the same business in the same premises and paid the rent as it accrued to Pope until the assignment to Porter and then to the latter. The rent for the last two months of the term remained unpaid, for which judgment by confession was entered, but the case was reopened for trial before a jury. A verdict was directed and the judgment confirmed. It is urged that the judgment is contrary to the law and the evidence, the defense being that there was a surrender of the premises by the lessees and acceptance thereof by the lessor and that the latter made a new lease on the same terms to the Cloak Company under which he and afterwards Porter collected rent as aforesaid. As there was a directed verdict the question arises whether there was any evidence tending to establish such defense. Drawing the most favorable inferences therefrom, as we are required to do (Wolf Co. v. Monarch Refrigerating Co., 252 Ill. 491) we do not think it showed

[illegible] v. [illegible],
Defendant in error,

vs.

[illegible] are
[illegible] Company
an [illegible], [illegible],
Plaintiff in error.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Porter was the assignee of a written lease of certain premises from one [illegible] to plaintiff in error, a department[illegible]. [illegible] after its execution the partnership was dissolved, and the business was sold to Cohn & Levin Glass and Jewelry Co., which continued the same business in the same premises and paid the rent as it accrued to Pope until the assignment to Porter and then to the latter. The rent for the last two months of the term remained unpaid, for which judgment by confession was entered, but was reversed for trial before a jury. A verdict was directed and the judgment confirmed. It is urged that the judgment is contrary to the law and the evidence, the defense being that there was a surrender of the premises by the lessee and acceptance thereof by the lessor and that the latter made a new lease on the same terms to the Glass Company which [illegible] the old afterwards [illegible] notice of forfeiture. [illegible] there was a directed verdict the question arises whether there was any evidence tending to establish such surrender, giving the most favorable inference thereto. [illegible] we are required to do (Wolf Co. v. Kansas Refrigerating Co., 224 Ill. 491) we do not think it showed

a new lease or a release of plaintiffs in error from their liability under the original lease. The evidence might have that tendency if the facts of a change of possession and acceptance of rent from the Cloak Co. stood alone unexplained by other evidence.

Negotiations for a new lease were attempted but never consummated. These facts were undisputed: that when the Cloak Co. took over plaintiffs in error's business one Miltenberg, a broker, at the request of attorneys for plaintiffs in error, asked one Wilson, the real estate agent of Pope, over the telephone whether the lease could be assigned to Cohn & Levin or whether a new lease would be given, and received the reply 'to look them up and if they were all right to bring the matter before him'; that Wilson (the only party shown by the record to have been authorized to act for Pope) never had any other talk with reference to the matter nor negotiated any new lease; that Miltenberg who was shown to have acted, not as an agent for Pope but at the request of plaintiffs in error, prepared a new lease to Cohn & Levin, and left it and a duplicate unsigned with Levin requesting him for references as to his financial standing; that no references were ever furnished; but that the rent was paid by the Cloak Co., as aforesaid, in sums and at times as provided for in the original lease.

While Levin testified that he sent the new leases to Miltenberg and they were subsequently returned bearing the name of Pope and that he destroyed them, yet there was no attempt to show that the signature was Pope's or ever authorized by him, or that the document ever came to Levin from an agent of Pope. The evidence showed nothing more than an attempt to negotiate a new lease and payment of rent as aforesaid.

a new lease or a release of liability in error from their liability under the original lease. The evidence might, at most, show only if the facts of a change of possession and acceptance of rent from the Clark Co. Ltd alone substantiated by other evidence.

Negotiations for a new lease were attempted but never consummated. These facts were substantiated: that when the Clark Co. took over plaintiffs in error's business one Hillenberg, a broker, at the request of attorneys for plaintiffs in error, asked one Allen, the real estate agent of type, over the telephone whether the lease could be assigned to John a Levin or whether a new lease would be given, and received the reply "we have been up and if they were all right to bring the matter before him"; that Allen (the only party shown by the record to have been authorized to act for Type) never had any other talk with reference to the matter nor negotiated any new lease; that Hillenberg who was shown to have acted, not as an agent for Type but at the request of plaintiffs in error, prepared a new lease to John a Levin, and left it and a duplicate assigned with Allen requesting the signature of Mr. Allen thereto; that no references were ever furnished; but that the rent was paid by the Clark Co., as aforesaid, in arrear and at times in advance for in the original lease.

While Levin testified that he sent the new lease to Hillenberg and they were subsequently returned bearing the name of some and that he destroyed them, yet there was no attempt to show that the signature was Type's or ever authorized by him, or that the document ever came to Levin from an agent of Type. The evidence showed nothing more than an attempt to negotiate a new lease and payment of rent as

The facts are very similar to those in Barnes v. Northern Trust Co., 169 Ill. 113, where it was held that the lessee is not released from his express covenant to pay rent unless the landlord has accepted the surrender of the lessee and released him, and that the latter would not be relieved from liability under the lease even though rent was received from another concern in possession of the premises unless there was a substitution of the new tenant in place of the original lessee, and a clear intent to make a new contract with the party in possession and to discharge the original lessee from further liability under the lease and an intent to accept the surrender of the lease from said lessee.

In the absence of legal proof of a new lease or a surrender of the old one or an acceptance thereof we think a verdict was properly directed.

Complaint is made of the exclusion of certain evidence, which was only cumulative in character. But if it had been received it would not have supplied any of the necessary elements above stated or have authorized a submission of the case to the jury.

AFFIRMED.

250 - 21232

PEOPLE OF THE STATE OF ILLINOIS, ex rel. Emma L. Parker, Plaintiff in Error,	ERROR TO SUPERIOR COURT, COOK COUNTY.
vs.	
MRS. WILLIAM BRYSON, Defendant in Error.	

1981.A.171

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

To determine the right of custody to her child relator, Mrs. Parker, sued out a writ of habeas corpus requiring the respondent, (defendant in error) to produce the child in court and show cause of its detention. The child was produced and without a formal return to the writ a hearing was had resulting in remanding the child to the care and custody of respondent.

While there was evidence of the mother's fitness to have the care and custody of the child there was a stipulation only as to respondent's fitness, and recognising as a fact the fitness of each, the court's order rested wholly on findings that the mother had abandoned the child on the date of its birth and that since that time it had been in the care and custody of respondent.

The inquiry was not as complete nor the interests of the mother as fully presented as might be desired. But in our opinion the testimony heard did not justify the court's order.

Mrs. Parker, was born, reared and lived most of the time in a country town in Fulton County, Illinois. She had been housekeeper for Dr. E. . Parker of that town, the father of the child, and about July 1, 1912, had come to

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

To determine the right of custody to her child relator, Mrs. Parker, sued out a writ of habeas corpus requiring the respondent, (defendant in error) to produce the child in court and show cause of its detention. The child was produced and with it a formal return to the writ a hearing was had resulting in remanding the child to the care and custody of respondent.

While there was evidence of the mother's fitness to have the care and custody of the child there was a stipulation only as to respondent's fitness, and recognizing as a fact the fitness of each, the court's order rested wholly on finding that the mother had abandoned the child on the date of its birth and that since that time it had been in the care and custody of respondent.

The inquiry was not as complete nor the witnesses of the mother as fully examined as might be desired. But in our opinion the testimony nevertheless not justify the court's action.

Mrs. Parker, was born, reared and lived most of the time in a country town in Pulaski County, Illinois. She had been housekeeper for Mr. [illegible], friend of their [illegible], the father of the child, and about July 1, 1921, had come to

Chicago pursuant to arrangements made by him for her approaching accouchement. It was ~~manifestly~~ intended that her condition should be kept secret from their friends and especially from his aged, invalid mother who lived with him and to whom he had made the promise not to marry while she lived. In view of relator's condition, however, he married her secretly at Milwaukee, Wisconsin, July 24, 1912, and though his mother died the following month the marriage and subsequent birth of the child on November 12, 1912, at the Polyclinic Hospital, Chicago, did not apparently become public until after his death in May, 1914. They never lived together after the marriage. ~~The evidence is too meagre as to his attitude towards her in the meantime, but he seems to have given her little, if any, consideration aside from the arrangements for hospital care, after she was in Chicago, and she seems~~ She appears to have been left helpless and alone among strangers and amid circumstances with which she was unfamiliar and unable to cope. In such situation she made known to the matron of the hospital and Dr. Bacon in charge that on account of "conditions at home she could not reveal the marriage nor arrange to care for the baby," and wanted a good home for it if she could not keep it. Accordingly pursuant to arrangements (of which she was evidently not fully advised), the child was taken from her arms and the hospital on the day of its birth and delivered to the respondent, Mrs. Bryson. She did not know who had the child, and Dr. Bacon, alone, of all her acquaintances did know. She afterwards frequently asked him about it but got no definite or satisfactory answer. Thrown upon her own resources and counsel, and still feeling bound to shield her husband and conceal the situation, she remained in Chicago in respectable employment earning only

Chicago pursuant to arrangements made by him for her appropriate accommodation. It was mutually intended if her condition should be kept secret from their friends and especially from his aged, invalid mother who lived with him and he was to be had made the promise not to marry while she lived. In view of reader's condition, however, he married her secretly at Kenosha, Wisconsin, July 24, 1912, and though his mother died the following month the marriage and subsequent birth of the child on Nov. 1, 1912, at the Polyclinic Hospital, Chicago, did not appreciably become public until after his death in May, 1914. They never lived together after the marriage. The evidence is too meagre as to his attitude towards her in the meantime, but he seems to have given her little, if any, consideration aside from the arrangements for hospital care, after she was in Chicago.

It here been left helpless and alone among strangers and amid circumstances with which she was unfamiliar and unable to cope. In such situation she made known to the matron of the hospital and Dr. Bacon in charge that on account of "conditions" at home she could not reveal the marriage nor arrange to care for the baby," and wanted a good home for it if she could not keep it. Accordingly pursuant to arrangements (of which she was evidently not fully advised), the child was taken from her arms and the hospital on the day of its birth and delivered to the respondent, Mrs. Bacon. She did not see nor see the child, and Mr. Bacon, albeit, of all her relations did know. The witnesses frequently asked him about it but got no definite or satisfactory answer. Thrown upon her own resources and crushed, and still feeling bound to shield her husband and conceal the situation, she remained in Chicago in respectable employment earning only

about enough for her own support. After her husband's death the matter became public, and learning for the first time through the public press that Mrs. Bryson had her child she immediately demanded possession of it, the refusal to give which resulted in said proceedings.

It is not difficult to understand how under such circumstances she pursued the course she did. Both she and Dr. Parker were respected and had good standing in the community in which they had always lived. She came to Chicago at his instigation to conceal the facts and evidently built hopes upon their secret marriage. But afterwards neglected and left in the hands of strangers, and still carrying the burden of a secret that had exiled her from home, she in ignorance and helplessness sought what under such circumstances seemed best for her child, a temporary home for it at least, hoping in a vague way for a favorable turn of events. In such a plight, under the stress of necessity and fear of exposure, she may well be excused for submitting passively to the guidance of others and not pressing with more persistence the inquiries her maternal instinct prompted. We do not think that she thereby forfeited the mother's superior right to the custody of her own child. The law jealously upholds and protects that right unless it has been forfeited by absolute relinquishment or some course of conduct or conditions that render its assertion incompatible with the parental claim and the child's best interests. (Cormack v. Marshall, 211 Ill. 523; Wohlford v. Burckhardt, 141 Ill. App. 321.) No such elements are presented in this record. The mother is a woman of good character and the child was not obtained from her in a way that precludes her from asserting such right. As to her ability to care for the child, it appears that her husband died intestate leaving an

about money for her own support. After her husband's death the matter became public, and learning for the first time through the public press that Mr. Brown had her child she immediately demanded possession of it, the refusal to give which resulted in said proceedings.

It is not difficult to understand how under such circumstances she pursued the course she did. Both she and Dr. Parker were respected and had good standing in the community in which they had always lived. He came to Chicago at his instigation to counsel the facts and evidently built upon some kind-hearted sentiments. Had affairs been left in the hands of strangers, and still carrying the burden of a secret that had exiled her from home, she in ignorance and helplessness thought that under such circumstances second best for her child, a temporary home for it at least, hoping in a vague way for a favorable turn of events. In such a plight, under the stress of necessity and fear of exposure, she may well be excused for submitting passively to the guidance of others and not pressing with more persistence the inquiries by medical institutions prompted. We do not think that she thereby forfeited the mother's superior right in the custody of her own child. The law jealously guards our sacrosanct rights unless it has been forfeited by absolute relinquishment or some course of conduct or conditions that render the assertion incompatible with the parental claim and the child's best interests. (Gorman v. Kurtzill, 21 Ill. 222; Kelliher v. Murphy, 1 Ill. App. 321.) We such elements are presented in this record. The mother is a woman of good character and the child was not obtained from her in a way that precludes her from asserting such right. As to her ability to care for the

estate of about $1800, which together with a proffered home on her father's small farm are now available to her. Compared with her natural rights the strain upon the feelings of the foster mother in parting with the child, hard as it may be, can not be considered.

We therefore reverse the judgment and remand the cause.

REVERSED AND REMANDED.

cases of abuse "BAD", such together with a preferred
home on her Federal small farm are now available to her.
Compared with her natural rights the attempt upon the
feelings of the foster mother in parting with the child,
hard as it may be, can not be considered.

I therefore reverse the judgment and remand
the cause.

ATTORNEY AND COUNSELOR.

251 - 21233.

A. J. BATES COMPANY,
Defendant in Error,

vs.

JOSEPH DI NUNZIO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 173

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

We are asked to review a judgment in an action of replevin and trover on a verdict of guilty and assessing damages in the sum of $77.10, upon assignments of error relating to the sufficiency of the evidence, the rulings thereon, the limiting of cross examination, and to given instructions. But plaintiff in error's brief contains no reference to any place in the abstract where we may discover any ruling of the Court claimed to be erroneous. In such a case the court can not be expected to search through the abstract to find the rulings complained of. (City of Lincoln v. C. & A. R. R. Co., 262 Ill. 98; Town, etc. v. Loper, 183 Ill. App. 60.) Furthermore an examination of the abstract reveals the necessity of an extended examination of the record itself to pass intelligently upon the questions intended to be presented. For instance the maker of the abstract states in one part of it that questions upon certain matters were "asked" by plaintiff and the court denied defendant's attorney "the privilege of asking the witness questions along these lines." Neither the questions nor evidence appear in the abstract, but turning to the page of the record referred to we find that the court merely ruled that defendant's counsel

281 - 21232.

G. J. DATES V. G.J.T.,

Judgment in error.

Court of
Queen's Bench
Manitoba. Court
of Appeal.

Judgment in error.

1952 I.A. 173

MM. 22 1952. WHEN DELIVERED THE OPINION OF THE COURT.

We are asked to review a judgment in an action of replevin and trover on a writ of nullity and assessing damages in the sum of $7,10, upon assignments of error relating to the sufficiency of the evidence, the ruling thereon, the limiting of cross-examination, and to given instructions. The plaintiff in error's brief contains no reference to any place in the abstract where we may discover any ruling of the court claimed to be erroneous. In such a case the court can not be expected to search through the abstract to find the minute examinations. (Duty of Litigants v. J. J. v. J. J., 1920 III. 90; Jones, Pub. v. Hanna, 1 Ill. App. 60.) Nevertheless an examination of the abstract reveals the necessity of an extended consideration of the record itself to pass intelligently upon the questions intended to be presented. For instance the motion of the defendant states in one part of it that questions upon certain matters were "asked" by plaintiff and the same counsel defendant's attorney "the privilege of asking the witness questions along these lines." Neither the questions nor evidence appear in the abstract, but turning to the page of the record referred to we find that the court merely ruled that defendant's counsel

would not be permitted to go over the same subject for the third time and that he insisted that he had the right to go over it "ten times to find if the witness contradicts himself." Again he complains of an instruction, the only one out of seventeen that is abstracted. Manifestly an abstract that requires us to go through the record to ascertain what were the actual rulings of the court and what were the controlling features of the evidence and what were the instructions to the jury does not meet the purposes for which one is required, and we can not undertake such a search. (People v. Stephens, 261 Ill. 121; Kelley v. People's Fire Ins. Co., 181 Ill. App. 142.) We have however read the abstract and from what it contains think substantial justice was done.

AFFIRMED.

would not be permitted to go over the same subject for the third time and thus be involved that he had the right to go over it "ten times to find if the witness contradicts himself." Speak be complaints of an instruction, the only one out of seventeen that is challenged. Manifestly an abstract that requires us to go through the record to ascertain what was the actual rulings of the court and what were the controlling features of the evidence and what were the instructions to the jury does not meet the purposes for which one is required, and we can not undertake such a search. Pounds v. Pounds, 201 Ill. 231; Dalley v. Donnelly 220 Ill. 74, 76 Ill. App. 549.) In this however read the abstract and from what it contains think substantial justice was done.

AFFIRMED.

309 - 20638.

NELLIE A. CROSS, Plaintiff in Error, vs. CITY OF CHICAGO, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 177

MR. PRESIDING JUSTICE PAM delivered the opinion of the court:

On October 6th, ~~the second day of the present term of this court~~, an opinion was handed down in the Appellate Court affirming the judgment of the Municipal Court of Chicago dismissing the cause of the plaintiff - which was an action for injuries sustained by the plaintiff - because in her statement of claim it was not alleged that the statutory notice of said injuries had been duly served upon the city.

Since this opinion was filed, ~~our~~ attention of the Court has been called to the decision in Enberg v. City of Chicago, 271 Ill. 404, filed December 22, 1915, (advance sheets,) wherein it is expressly held that in fourth class cases (and the action in the case at bar was of that character) a statement of claim need not allege the giving of the statutory notice, even though such averment is necessary in a common law declaration. In view of this decision, the former opinion affirming the judgment of the Municipal Court of Chicago is withdrawn, and for the error of the court in dismissing the cause of action because plaintiff's statement of claim did not aver that the statutory notice had been served upon the City of Chicago, the judgment is hereby reversed and the cause remanded.

REVERSED AND REMANDED.

MELLIE A. CHUNG,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BAR delivered the opinion of the court:

On October 8th, the second day of the present term of this court, an opinion was handed down affirming the judgment of the Municipal Court of Chicago dismissing the cause of the plaintiff - which was an action for injuries sustained by the plaintiff - because in her statement of claim it was not alleged that the statutory notice of said injuries had been duly served upon the city.

Since this opinion was filed, our attention has been called to the decision in Ambrose v. City of Chicago, 271 Ill. 464, filed December 22, 1915, (advance sheets) wherein it is expressly held that in fourth class cases (and the action in the case at bar was of that character) a statement of claim need not allege the giving of the statutory notice, even though such averment is necessary in a common law declaration. In view of this decision, the former opinion affirming the judgment of the Municipal Court of Chicago in ejectment, and for the error of the court in dismissing the cause of action because plaintiff's statement of claim did not aver that the statutory notice had been served upon the City of Chicago, the judgment is hereby reversed and the cause remanded.

REVERSED AND REMANDED.

437 - 21835

FRED MILLER BREWING COMPANY,
a corporation,
Appellee,

vs.

G. HEILEMAN BREWING COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 178

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In an action for the purchase price of saloon fixtures, on trial by the court, plaintiff had judgment for $1,500, from which defendant appeals, saying that its agent who contracted for the purchase of the fixtures had no authority to bind it in that respect.

~~Under the evidence the court properly could find that~~ Plaintiff was lessee of premises No. 2109 Wabash avenue and ~~was~~ the owner of saloon and restaurant fixtures therein; ~~that~~ In March, 1912, representatives of plaintiff had a conversation with Walter G. Mueller, who was the manager of the Chicago branch of the defendant company, whose main office was in Wisconsin; ~~that~~ at ~~this~~ which time the saloon business was not conducted in these premises because the saloon license had been revoked; ~~that~~ During this conversation it was agreed between these representatives of the respective breweries that the defendant would purchase from the plaintiff the fixtures and furniture contained in the premises and also the lease, which would be assigned to the defendant, but that the $1,500 purchase price would not be paid until Mr. Mueller was sure the license would be restored. The lease was dated January 20, 1912, and ran to the plaintiff as lessee, and at this

[illegible] a corporation,
Appellee,

vs.

[illegible] a corporation,
Appellant.

APPEAL FROM
CHAMPAIGN COUNTY
[illegible] DIVISION.

[illegible]
DELIVERED [illegible] OF THE COURT.

In an action for the purchase price of saloon fixtures, on trial by the court, plaintiff had judgment for $1,400. Upon which judgment it was held, saying that the agent who contracted for the purchase of the fixtures had no authority to bind it in that respect.

Under the evidence the court properly held that plaintiff was lessee of premises [illegible] and was the owner of saloon and refreshment fixtures therein. Since in March, 1912, representatives of plaintiff had a conversation with [illegible], the manager of the [illegible] department, where said [illegible] was in [illegible] at that time the saloon business was not conducted in those premises because the saloon license had been previously [illegible] this conversation it was agreed between their representatives of the respective properties that the defendant would purchase from the plaintiff the fixtures and furniture contained in the premises and also the lease, which, so far as material to the defendant, but that $1,800 purchase price would not be paid until Mr. Smalley was sure the license would be received. The lease was dated January 20, 1912, was to the plaintiff as lessee, and at this

time, by apt words in writing, the lease was assigned from plaintiff to defendant, the defendant signing "G. Heileman Brewing Company (Seal), by Walter G. Mueller." The landlord consented to this assignment. At the same time, by another writing signed by the respective parties in the same manner, it was agreed that the furniture in the saloon should be sold by the plaintiff to the defendant, the defendant agreeing to pay therefor the sum of $1,500 as soon as a saloon license should issue from the City of Chicago for the operation of a saloon on said premises. Later on this license was issued, and on June 13, 1912, the saloon business was resumed.

Defendant entered into possession of the premises and ~~of the~~ furniture, and paid rent under the lease from and including June, 1912, until the expiration of the lease on April 30, 1913. It used the furniture in question during all of this time, and never offered to return the same or to re-assign the lease. After the license was issued request was made of defendant to pay the $1,500, which was refused by the defendant.

Whatever may be said concerning Mueller's authority in the first instance, defendant must be held to have ratified this agreement entered into by Mueller. Defendant's officers had knowledge of the agreement, and while they protested as to the price they continued to hold possession of the fixtures and of the leased premises and, so far as the record shows, never offered to return the furniture to the plaintiff. This conduct amounted to a ratification of Mueller's agreement, and defendant is obligated to pay the price named. This is in accordance with the decisions in many cases, among which are Connett v. City of Chicago, 114 Ill. 233; Searing v. Butler, 69 Ill. 575; and Grollman v. Montgomery Ward & Co., 181 Ill. App. 598.

The judgment was right and is affirmed.

AFFIRMED.

time, by oral words in writing, the lease was assigned from plaintiff to defendant, the defendant claiming "G. Heilmann brewing company (sect), by Walter G. Mueller." The landlord consented to this assignment. At the same time, by another writing signed by the respective parties in the same manner, it was agreed that the furniture in the saloon should be sold by the plaintiff to the defendant, the defendant agreeing to pay therefor the sum of $3,500 as soon as a saloon license should issue from the City of Chicago for the operation of a saloon on said premises. Later on this license was issued, and on June 16, 1913, the saloon business was resumed.

Defendant entered into possession of the premises and took the furniture, and paid rent under the lease from and including June, 1913, until the expiration of the lease on April 30, 1915. It used the furniture in question during all of this time, and never offered to return the same or to reassign the lease. After the license was issued request was made of defendant to pay the $3,500, which was refused by the defendant.

Upon the ground that defendant mueller's authority in the first instance, defendant must be held to have ratified this agreement entered into by Mueller. Defendant's officers had knowledge of the agreement, and while they protested as to the price they continued to hold possession of the fixtures and of the license premises and, so far as the record shows, never offered to return the furniture to the plaintiff. This conduct amounted to a ratification of Mueller's agreement, and defendant is obligated to pay the price named. This is in accordance wit the decisions in many cases, among which are Leonard v. City of Chicago, 111 Ill. 600; Carlson v. Thrane, 47 Ill. 379; and Williams v. Continental Bank & Co., 181 Ill. App. 588.

The judgment was right and is affirmed.

AFFIRMED.

477 - 21875

WALTER J. BECKER,
Appellee,

vs.

SIEVERT HOLLESEN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 180

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff ~~brought suit~~ alleged that in January, 1913, defendant promised to pay him 2½ per cent. commission if plaintiff would procure purchasers for certain real estate belonging to defendant, at a price of $55,000; that about April 14, 1913, plaintiff did so, but defendant refused to abide by his promise. Upon trial by the court plaintiff had judgment for the amount claimed, $1,375, from which defendant appeals.

The evidence tended to show that in April, 1913, defendant owned a ~~certain~~ tract of land, situated in Evanston, Ill., north of Seven avenue and east of Clark street, which ~~will hereinafter be~~ was designated as "the ball park," and another piece of land nearby, which ~~will hereinafter be~~ was called the Schreiber avenue strip. The ball park was used as ~~a baseball park~~ such, with grand stand, ticket offices and appurtenances, under a lease for a term of eight years beginning April 1, 1909. A portion of the Schreiber avenue strip was also under lease for a term of three years beginning October 1, 1911, with privilege to the lessee of renewal for an additional period of three years. In the latter part of 1912, or perhaps in January, 1913, plaintiff, a real estate broker, asked defendant what price was wanted for the ball park and defendant gave him a price of $45,000.

Afterwards, in April, 1913, plaintiff told defendant that he thought he had a purchaser for the ball park provided the Schreiber avenue strip could also be purchased, and upon inquiring as to the price of that was told that it could be bought for $10,000. Later on plaintiff and defendant met Henry C. Bartling and Selma Sundsten, prospective purchasers procured by plaintiff, ~~and~~ a written option agreement was drawn up and $1,000 deposited to be held in escrow pending the exercise of the option. This option gave the prospective purchasers the privilege of purchasing on or before October 15, 1913, both the ball park and the Schreiber avenue strip at a price of $55,000, and provided ~~there was a further provision that~~ the option contract should be void if the "leases on the above premises are not removed," and that in this event the escrow money should be returned to the prospective purchasers. After the execution of this agreement attempts were made in divers ways to cancel the lease on the ball park, but without success. By June 25, 1913, all the parties apparently being of the opinion that there was no prospect of canceling or forfeiting the lease, it was agreed by them that the option agreement should be canceled and the money refunded, and this was accordingly done. ~~and on that date they met at the offices of the Chicago Title & Trust Company and the option agreement was then and there canceled and the earnest money returned to the prospective purchasers.~~

Defendant continued in his efforts to secure the cancellation of the lease on the ball park, and in August, ~~after negotiations with the officers of the baseball club,~~ terms were agreed on between him and the ball club ~~upon~~ which involved a remittance to the club of $1,000 of rent in consideration of which the lease was canceled by mutual agreement. ~~Some time~~ During the following month plaintiff went to defendant and said he had

heard that the lease had been canceled, ~~and upon being~~ informed that this was true, and plaintiff said that he would see his parties again. Afterwards he reported to defendant that his parties wanted ~~be time~~ time to get estimates on paving, sewers, and other improvements, as it was contemplated to subdivide the ball park. ~~At this time~~ Defendant then stated that he would not sell the Schreiber avenue strip at all. Some weeks later plaintiff, with Bartling and Sundsten, called upon ~~the~~ defendant and was told by him that he would not sell the Schreiber avenue strip, and that his price on the ball park was $50,000. This the parties refused to pay, and no further negotiations between them were had.

Plaintiff claims 2½ per cent. commission on $55,000, the price originally given him by defendant for all of the said real estate.

It is conceded by plaintiff that he has no claim based upon procuring the option contract, and this must necessarily be so, for the performance of this contract was conditioned upon the termination of the lease of the ball club. This condition failed, thus rendering nugatory any obligations under the contract, and by consent of all parties it was canceled. We are not impressed by the contention that this cancellation was merely a pretended cancellation to mislead the baseball club into believing that the urgency for canceling the lease had passed. The option contract was in fact and in law canceled and abrogated.

Having told plaintiff in 1912, or January, 1913, that he would sell the baseball park for $45,000, was defendant bound to that price in the fall of 1913? The property had cost him at least $1,000 more by that time

in the rent remitted as consideration for canceling the lease. There may have been other reasons why defendant thought the property was worth more. We know of no rule that would obligate an owner for an indefinite period by his verbal reply to an inquiry as to the price of real estate. After the cancellation of the contract defendant was wholly free to ask any price he pleased for his property, or to sell or not, as he wished. He had the right to ask $50,000 for the ball park, and it is not claimed that plaintiff ever procured a purchaser ready, willing and able to buy at that price. Another consideration of importance is the fact that at no time is it made to appear that plaintiff procured purchasers willing and ready to buy the ball park and the Schreiber avenue strip with a lease thereon running to September, 1917. Even upon plaintiff's theory that defendant was bound by his original price placed upon the premises, plaintiff has not produced purchasers ready to buy at that price under existing conditions.

We hold that plaintiff is not entitled to recover, and the judgment is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

516 - 21914

HIRAM S. WARNER,
Appellee,

vs.

PACIFIC COAST CASUALTY COMPANY OF SAN FRANCISCO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

198 I.A. 183

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In a suit for commissions claimed under an agency contract, tried by the court, plaintiff had judgment for $10,067.91, from which defendant appeals.

The contract sued on, dated February 1, 1906, provided ~~some other things~~ that plaintiff should have the exclusive right in the state of Illinois to insurance business ~~on the lines of~~ burglary, plate glass and employers' liability, his compensation to be 40 per cent. of premiums on all policies issued within said territory, and a further commission of 10 per cent. upon the net profits; instructions in writing to the plaintiff from the home office (in San Francisco) by the defendant to be construed to be part of the contract; contract terminable on 30 days' written notice by either party.

Cont. "A"

As suggested by defendant's counsel, the claim may for convenience be considered in three parts. The first part is for the difference between 40 per cent. and 30 per cent. of premiums on employers' liability insurance. It is claimed that the original compensation of 40 per cent. was reduced by agreement to 30 per cent. On April 23, 1907, defendant wrote plaintiff that it did not care for any ex-

Cont. "B"

tended line of this kind of business, that the business could not stand a higher commission rate than 30 per cent. and it would accept such insurance on that basis only, and "if the business cannot be written on this basis as general agent commission kindly do not write it." ~~We are of the opinion that~~ This appeared to have been agreed to by plaintiff, as shown both by his reply letter dated May 6, 1907, and his subsequent conduct in deducting only 30 per cent. of premiums in making remittances. ~~That the contract was not signed until September, 1906, although dated February 1, 1906, is not important.~~ There was a contract between the parties from February, 1906, under which they were acting, the terms of which appeared in the writing subsequently signed by them. The signing was not necessary to give this contract vitality.

Is this agreement to accept 30 per cent. binding in law? We hold that it is: (1) Even on the theory that a consideration is necessary, the acceptance by defendant of liability insurance after its notice to plaintiff that it would not accept this kind except on a 30 per cent. basis is sufficient consideration. (2) The agreement was executed by the parties, hence is binding. A parol agreement to modify an instrument under seal, when executed is valid. Snow v. Grieshaimer, 240 Ill. 106, where the court said: "If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed." We hold that the court was in error in allowing plaintiff this difference of 10 per cent. on liability insurance.

The second part of plaintiff's claim ~~is~~ was for 40

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tenure line of this kind of business, that the business could not stand a higher commission rate than 2% per cent, and it would accept such insurance on that basis only, and "if the business cannot be written on this basis as general agent consistent kindly do not write it." Among-of-the-opinion that [illegible] agree to its plaintiff, as shown here by his policy letter dated May 6, 1917, and his subsequent conduct in declining only to pay more, or promise to pay more, in misinsure. [illegible] [illegible] ber, line, although under instructions, in not insuring. There was a contract between the parties from February, 1917, under which they were acting, the terms of which appeared in the written correspondence signed by them. The situation was not sufficiently to give this contract validity.

In this agreement no mention is made of the court, binding in law. We hold that it is: (1) Even on the theory that a consideration is necessary, the acceptance by defendant of liability insurance after its notice to plaintiff that it would not accept this kind subject on a 2% per cent, basis is sufficient consideration. (2) The agreement was executed by the parties, hence is binding. A parol agreement to modify an instrument-under seal, when executed in whole or in part, binds the court also. Cases cited in which the court held the contract was in error in effecting-the alleged-this difference of 1% per cent. on liability insurance.

The second part of plaintiff's claim is that it

per cent. commission on liability insurance written by the firm of Burras & Goodbody in the years 1910 and 1911. Defendant claims that in the latter part of 1910 it was agreed by it and plaintiff that the business in Illinois was to be divided so that the firm of Burras & Goodbody should be the general agent for employers' liability insurance instead of plaintiff, who was to continue as agent in lines of plate glass and burglary insurance only.

The determination of the fact of such an agreement is not free from difficulty. However, we have arrived at the conclusion that this agreement was made and carried out. Some of the evidence influencing us is the testimony of the witnesses Green, Burras and Goodbody; the correspondence between plaintiff and defendant, with particular reference to the letter from defendant dated November 14, 1910, and plaintiff's reply dated November 21, 1910; also the manner in which plaintiff and Burras & Goodbody interchanged business, that is, plaintiff brought all liability insurance business coming to him to Burras & Goodbody, who paid plaintiff all the commission thereon, while this firm gave plaintiff its burglary and plate glass insurance business and received the commission. We do not construe the letter from defendant dated November 14, 1910, as a 30 days' notice to cancel the contract. It seems to be merely a threat to sever all relations with plaintiff unless he observed strictly the agreement to divide the business as had been arranged, and in plaintiff's reply of November 21st he seems to resent any suggestion that he had not strictly observed this agreement; defendant apparently accepted his statement of the fact and did not at that time terminate his plate glass and burglary insurance agency; this was subsequently done, in January, 1912.

[illegible] and burglary insurance policy.

[illegible] plaintiff, who was in continuous ill health at times of giving notice for policyholders' liability insurance instead of [illegible] for employers' liability insurance instead of [illegible] given to the plaintiff. However, he here argues [illegible] that the [illegible] of the witnesses given, letters and [illegible]; the correspondence between plaintiff and defendant, with particular reference to the letter from defendant dated [illegible] 14, 1911, and plaintiff's reply under September 19, 1911; also the manner in which financially and having a [illegible] insurance business, that is, plaintiff assumed all liability insurance business coming to him as [illegible] a [illegible], who paid plaintiff all the commission thereon, while this firm have plaintiff its policy and plaintiff insurance business and received the commission. In direct contrast [illegible] letter from defendant dated [illegible] 14, 1911, [illegible] the [illegible] contract [illegible] and [illegible] the [illegible] plaintiff's [illegible] to [illegible] a [illegible] to [illegible] all relations [illegible]. It should be [illegible] a [illegible] to [illegible] with financial matters be obtained solely the [illegible] to [illegible] one business [illegible] been [illegible], and in plaintiff's reply of [illegible] that he [illegible] to [illegible] any [illegible] that he had not strictly observed this [illegible]; defendant [illegible] recognized his [illegible] of the fact and did not [illegible] that then [illegible] his [illegible] and burglary insurance [illegible]; this was [illegible] done, in January, 1911.

We are of the opinion that this agreement to modify the contract by thus dividing the insurance business was valid. It may be said that the consideration for the modification was the continuance of the agency of plaintiff for plate glass and burglary insurance. As we have indicated, the defendant would have terminated the contract in November, 1910, unless this agreement was in force. Further, the legal consideration applicable to the first part of plaintiff's claim is applicable to this part, namely, the evidence shows that this agreement was executed, and having been executed by the parties will not be disturbed. Snow v. Grieshaber, supra. We hold that it was error to allow plaintiff anything for this part of his claim.

The third part of plaintiff's claim ~~is~~ was for commissions on certain ~~plate glass and burglary~~ insurance written by agencies ~~in southern Illinois~~ amounting to $3,818.47, against which defendant ~~says that it is entitled to have credited against this~~ claimed certain amounts which appear to be credits given to defendant by plaintiff in the copy of account attached to his declaration. We cannot agree with this contention. The copy of account is not part of the declaration. Missouri River Telegraph Co. v. First National Bank, 74 Ill. 217. Therefore, to become part of the record it must be introduced in evidence as any other writing. This was not done, and we can not consider it.

Plaintiff is entitled to judgment for this last item of $3,818.47 less an admitted set-off of $500, which would leave the correct amount of the judgment at $3,318.47. The judgment is reversed and judgment in this court is entered for the plaintiff against the defendant in the sum of $3,318.47.

REVERSED AND JUDGMENT HERE.

551 - 21949

MARY VON DER BRELIE,
Appellant,

vs.

HENRY VON DER BRELIE,
Appellee.

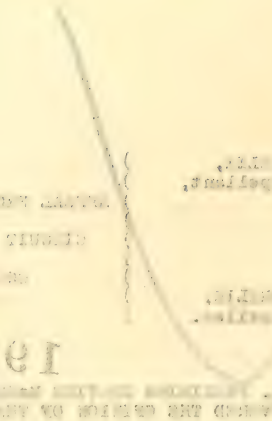
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

198 I.A. 187

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

On July 2, 1913, complainant filed her bill alleging that the defendant on June 22, 1913, had abandoned her, leaving her without means of support. She asked that defendant be enjoined from conveying, disposing of or encumbering his property, and that he pay solicitor's fees and a sum for her maintenance and support. By subsequent amendment complainant further details the conduct of defendant. To this defendant filed an answer denying misconduct on his part, denying that they were living separate and apart, and containing animadversions upon the conduct of his wife. Subsequently hearing was had before the chancellor, who being of the opinion that the equities were with the defendant ordered that complainant's bill of complaint and the amendments thereto be dismissed for want of equity. From this decree complainant has appealed.

The statute on separate maintenance, in force July 1, 1877, Hurd's Ill. Stat., Chap. 68, provides that married women "who, without their fault, now live or hereafter may live, separate and apart from their husbands," may have remedy "for a reasonable support and maintenance, while they so live or have so lived separate and apart." We are of the opinion that the complainant failed to prove that she and her husband were living separate and apart without her fault. We shall not narrate the details of the frequent and unhappy controversies



1924 A. 187

IN THE MATTER OF THE CLAIM OF THE COUNTY

On July 2, 1924, complainant filed her bill alleging that the defendant on June 22, 1924, had abandoned her, leaving her without means of support. She asked that defendant be enjoined from conveying, disposing of or encumbering his property, and that he pay solicitor's fees and a sum for her maintenance and support. By subsequent amendment complainant further details the conduct of defendant. To this defendant filed an answer denying misconduct on his part, claiming that they were living separate and apart, and containing numerous claims upon the conduct of his wife. Subsequently hearing was had before the chancellor, who being of the opinion that the equities were with the defendant ordered that complainant's bill of complaint and the amendments thereto be dismissed for want of equity. From this decree complainant has appealed.

The statute on separate maintenance, in force July 1, 1877, Hurd's Ill. Stat., Chap. 68, provides that married women "who, without their fault, now live or hereafter may live, separate and apart from their husbands," may have remedy "for a reasonable support and maintenance, while they so live or have so lived separate and apart." We are of the opinion that the complainant failed to prove that she and her husband were LIVING separate and apart without her fault. We shall not narrate the details of the frequent and unhappy controversies

between the parties, in which neither side was free from fault. We are inclined to believe, however, that if this unfortunate couple had been left to themselves they would have lived happily together. The conduct of a son of the complainant seems to have furnished considerable ground for annoyance, while it is evident that the children of defendant have been potent instrumentalities in causing irritation to the complainant and unhappiness to the defendant.

Whatever may have been the cause of the discord, the evidence clearly shows that the complainant, as she herself has stated, has declined to live with the defendant unless he should either convey to her some of his property or cancel a certain lease which he has made for an extended period to a son-in-law. Defendant had a lawful right to dispose of his property as he saw fit, subject, of course, to the dower interest of complainant. She may justly feel aggrieved by her husband's conveyance of his property, but this does not give her legal grounds for refusing to live with him; certainly while the husband offers to provide a home and to live with her, and she refuses unless he disposes of his property as she wishes, she is not within the statutory conditions entitling her to separate maintenance.

Much is said concerning the alleged desertion of his wife by the husband, but in the light of the testimony we cannot construe his temporary absence as amounting to a desertion. Under the advice of a physician he left for a period of rest, impelled thereto by the conduct of his wife.

The decree of the chancellor was right and is affirmed.

AFFIRMED.

between the parties, in which neither side was free from fault. We are inclined to believe, however, that if this unfortunate couple had been left to themselves they would have lived happily together. The conduct of a son of the complainant seems to have furnished considerable ground for annoyance, while it is evident that the children of defendant have been potent instrumentalities in causing irritation to the complainant and unhappiness to the defendant.

Whatever may have been the cause of the discord, the evidence clearly shows that the complainant, as she herself has stated, has declined to live with the defendant unless he should either convey to her some of his property or commit a certain issue which he has made for an extended period to a son-in-law. Defendant has a lawful right to dispose of his property as he saw fit, subject, of course, to the lower interest of complainant. The may justly feel aggrieved by her husband's conveyance of his property, but this does not give her legal grounds for refusing to live with him; certainly while the husband offers to provide a home and to live with her, and she returns unless he disposes of his property as she wishes, she is not within the statutory conditions entitling her to separate maintenance.

Much is said concerning the alleged desertion of his wife by the husband, but in the light of the testimony we cannot construe his temporary absence as amounting to a desertion. Under the advice of a physician he left for a period of rest, [illegible] by the [illegible] of the [illegible] and is

[illegible].

[illegible].

584 - 21982

RICHARD DEVINE, a minor, by Mamie Lenihan, his next friend, Appellee,

vs.

CHICAGO RAILWAYS COMPANY, Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

198 I.A. 188

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Richard Devine, plaintiff, seven years seven months old, was struck by a street car belonging to defendant. He was severely injured. He brought suit and had judgment for $12,500 from which defendant appeals.

In the fall of 1912 plaintiff attended the Sexton school, at the northeast corner of Wells and Wendell streets in Chicago. Street cars run north and south on Wells. On September 26th about 11:30 o'clock in the morning plaintiff, having been dismissed from school, started to cross Wells street, when he was struck by a southbound car. We shall not state the facts more in detail, for in our opinion the giving of an erroneous instruction to the jury necessitates another trial.

By one of the counts of the declaration it was alleged that there was in force at the time of the accident a certain ordinance of the city of Chicago which declared it to be unlawful to run a street car while within 200 feet of any school house in the city at a speed greater than five miles an hour, between the hours of 11 a. m. and 1:45 p. m. of any day during which school is in session in such school house, and that the defendant, negligently and contrary to the ordinance, ran its cars on Wells street at a speed greater than five miles an hour within the prescribed distance and time,

1951 I.A. 188

IA. [illegible] DRIVING ON [illegible]

RELATING THE LIABILITY OF THE OWNER.

Plaintiff [illegible], [illegible], asserts seven causes of action, one alleged by a direct car bailment to defendant. He was severely injured. He brought suit and had judgment for $15,000 from which defendant appeals.

In the fall of 1951 plaintiff attended the Westbom school, as the referees report of trial was [illegible] affairs in Chicago. Latest evidence has been one month or more on September 1951 since Lin's driver in the morning plaintiff, having been dismissed from school, started to cross this street when he was struck by a motorcycle and car. He small but alive has fails more in hospital, for, in our opinion the giving of an extreme instruction to the jury necessitates another trial.

In one of the counts of the declaration it was alleged that there was in force at the time of the accident a certain ordinance of the city of Chicago which declared it to be unlawful to run a street car while within one foot of any school house in the city at a speed greater than five miles an hour, between the hours of 11 a. m. and 1:30 p. m. of any day during which school is in session in such school house, and that the defendant, negligently and contrary to the ordinance, ran its car on said street at a speed greater than five miles an hour within the prescribed distance and time.

by means whereof the accident occurred. It was sought to introduce the ordinance in evidence, and while there was irregularity in the manner of offering it, such irregularity should not again occur. There was evidence tending to support the allegation of a violation of the ordinance.

At the request of plaintiff the court gave to the jury instruction No. 9, which is somewhat long but may be summarized as telling the jury that if they believed that between 11 a. m. and 1:45 p. m. the plaintiff was struck by the street car while crossing Wells Street within 250 feet of the school house, and that the car was then being operated at a speed greater than five miles per hour, the plaintiff exercising due care for one of his age, etc., and that by reason of the violation of the ordinance the plaintiff was injured, then the defendant must be found guilty.

Contentions urged against the appearance of the ordinance in the record, its existence, its validity, or its applicability based on measurements from the school house, do not impress us as having substantial merit. However, we are of the opinion that it was error to instruct the jury that a violation of the ordinance as a matter of law is negligence per se. We are aware that the decisions are not wholly harmonious on this point, but this court is convinced that the better reasoning and greater weight of authority support the view that the violation of an ordinance is prima facie evidence of negligence from which the jury may infer negligence, but such inference may be rebutted by evidence.

It is not difficult to imagine many exigencies, such as sudden illness of the motorman, inexplicable defect in the machinery, or its derangement through collision, or

slipperiness of the rail, which might cause the car to run faster than five miles per hour, but manifestly the excess of speed of itself should not as a matter of law constitute negligence, with opportunity for explanation denied. The principle is the same where the exculpatory circumstances are less obvious. The jury should be permitted in determining negligence to consider all the circumstances of the occurrence, including the violation of the ordinance. Among the cases supporting this view are, Knupfle, Admr., v. Knickerbocker Ice Co., 84 N. Y. 488; Boston South Boston Horse Ry. Co., 128 Mass. 510; Connor v. Electric Traction Co., 173 Pa. 602; Kerr v. Pennsylvania R.R., 39 Md. St. 652; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; Erie Railroad Co. v. Ferrell, 147 Fed. 420; Beck v. Portland L. V. R. Co., 25 Ore. 32; Mollica v. Mich. Cent. R. Co., 170 Mich. 96; Illinois Central R. Co. v. Nicher, 202 Ill. 556; Illinois Central R. Co. v. Ashline, 171 Ill. 313; Commonwealth Electric Co. v. Rose, 214 Ill. 545; United States Brewing Co. v. Stoltenberg, 211 Ill. 551; Trus & Trus Co. v. Eddy, 201 Ill. 318; Heidenreich v. Bremner, 260 Ill. 439; Elliott on Railroads, 2nd ed., sec. 1095, note 140.

Upon the record before us we are not disposed to agree with the contention of counsel for defendant as to the manifest preponderance of the evidence or as to the contributory negligence of plaintiff.

There was serious error in the rulings on the testimony of plaintiff's witness Mrs. Brown. She had testified as to the speed of the car based upon what she had heard. The motion to strike out such testimony was overruled. This was error.

The criticism of plaintiff's instruction No. 10 is not well taken. It properly limits the loss of future earning capacity to the time after plaintiff shall have reached his majority. The reference to the declaration could not have been misleading.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

599 - 21997

SPEER HARDWARE COMPANY,
a corporation,
Appellee,

vs.

CONSOLIDATED ADJUSTMENT
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 190

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to have reversed a judgment against it of $2,881.82 upon a guaranty contained in a contract entered into between it and the plaintiff whereby defendant undertook to collect certain accounts for plaintiff. Cases involving the contracts made by this defendant with its customers have been before the Appellate Court of this district so frequently that we shall not again set forth the contract in detail; they are very much alike and the general scheme in all of them is the same. A partial list of these cases is, Hinrichs v. Consolidated Adjustment Co., 145 App. 8; Mound City Distilling Co. v. Same, 152 App. 155; Standard Distilling Co. v. Same, 157 App. 215; Barstow Stove Co. v. Same, 175 App. 449; Pritz v. Same, 189 App. 287; Baltimore Trust Co. v. Same, 190 App. 30; and Krause & Managan Lbr. Co. v. Same, 191 App. 582.

In the present case the defendant contends that the accounts furnished by plaintiff to it for collection were not of the kind and character contemplated by the contract. To this it is sufficient to reply that from the evidence the trial court properly could find that the accounts furnished were selected and listed by defendant's own agent, and that the contract was entered into with special reference to these

accounts. Having selected the accounts upon which defendant undertook to guarantee collection, it can not now be heard to say that plaintiff is in default as to the kind of accounts to be furnished by it.

As to other contentions made by defendant, what has been said by Mr. Justice Duncan in Barstow Stove Co. v. Consolidated Adjustment Co., 175 Ill. App. 449, is applicable in many respects. We adopt what is there said as expressing our view of the correct construction of the contract.

Under the evidence and the law the judgment was correct and is affirmed.

AFFIRMED.

accounts. Having adopted the accounts upon which defendant undertook to guarantee collection, it can not now be heard to say that plaintiff is in default as to the kind of accounts to be furnished by it.

As to other contentions made by defendant, what has been said by Mr. Justice Bennett in Dominion Lines Ltd. v. Consolidated Adjustment Co., 1925 III. App. 440, is applicable in many respects. It might also be there said as expressed by our view of the correct construction of the contract.

Order for reference and for the plaintiff and costs and in affirmed.

601 - 21999

GALVESTON SHOE & HAT COMPANY,
a corporation,
Appellee,

vs.

CONSOLIDATED ADJUSTMENT
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 191

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In this case plaintiff brought suit upon the guaranty of defendant contained in a contract similar to the contracts involved in other suits against this defendant, as noted in opinion in No. 21997 this day filed. In this case, however, the court struck defendant's affidavit of defense from the files and entered judgment by default for $1,871.45.

It is contended that by the contract it is expressly provided that the terms of the guaranty shall not apply to "bankrupt claims," "outlawed claims" and "lost debtor claims," and that many of the accounts furnished by plaintiff to defendant were of this character. If we concede that the contract bears this construction - and it is not free from doubt - yet we think defendant is prevented from now questioning the character of the claims by that provision of the contract whereby defendant reserves "the right to cancel the contract, refund said initial fee and surrender all claims listed hereunder at any time within six months from date." To give this meaning, which we are bound to do if possible, it seems clear that it is intended to fix a period of time within which defendant may investigate and ascertain the character of the accounts submitted; and it must be held as a matter of law,

In this case plaintiff brought suit upon the guaranty or defendant contained in a contract similar to the contracts involved in other suits against this defendant, as noted in opinion in Co. 41997 this day filed. In this case, however, the court stress [illegible] affidavit of defense from the [illegible] judgment by default for $4,[illegible].

It is contended that by the contract it is expressly provided that time of the guaranty shall not apply to "construct claims," "retained claims" and "last debtor claims," and that many of the accounts furnished by plaintiff to defendant were of this character. If we concede that the [illegible] - yet we think defendant is prevented from now questioning the character of the claims by that provision of the contract [illegible] "the right to cancel the contract, [illegible] all claims listed hereunder at any time within six months from date." To give this meaning, which we are bound to do if possible, it seems clear that it is intended to fix a period of time within which [illegible] and it must be held as a matter of law,

if after this period of time has elapsed, in which it will be presumed such an investigation has been made, and defendant does not elect to return the initial fee and the claims and cancel the contract, that it is satisfied the claims are of a kind upon which it can make its guaranty good. We think the general rule is applicable here, that the law will not permit a party having once elected, to change such election. Platt v. Aetna Ins. Co., 153 Ill. 113; Van Vlissingen v. Lenz, 171 Ill. 162.

We think, however, that defendant should have been permitted to go to trial for the reason, as we have decided in Pritz v. Consolidated Adjustment Co., 189 App. 287, that defendant was entitled to a reasonable time after the lapse of three years within which to collect the amount guaranteed to be collected, and that there was no breach of the guaranty until after the lapse of such reasonable time. As to whether or not a reasonable time had elapsed after the expiration of the contract in question, which was on September 9, 1913, was a question of fact to be ascertained after consideration of evidence.

Plaintiff has assigned as cross-error the action of the court in refusing to strike defendant's first affidavit of defense from the files on the ground that it was not filed in time. This is a matter pertaining to the practice in said court, and we are not of the opinion that a reversal of the order permitting the affidavit to be filed is necessary to prevent a failure of justice. Ill. Stat., Hurd, chap. 37, Sec. 324.

For the reason indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

603 - 22060

TEXAS COMPANY, a corporation,
Appellee,

vs.

CONSOLIDATED ADJUSTMENT
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

193 I.A. 192

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This case is in every respect substantially like the one in which we have this day filed an opinion, No. 21999, and what we have said in that opinion applicable herein is reaffirmed. For the reason indicated in that opinion the judgment in this case is reversed and the cause remanded.

REVERSED AND REMANDED.

618 - 22016

C. L. GRAY LUMBER COMPANY,
a corporation,
Appellee,

vs.

OTTO SCHAMMER, trading as the
SCHAMMER CONSTRUCTION COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

198 I.A. 193

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, a lumber company of Mississippi, brought suit alleging an agreement by it to furnish, and by defendant, a Chicago contractor, to take, some 300,000 feet of lumber; that defendant refused to perform his undertaking, to the damage of plaintiff. Upon trial by a jury the issues were found for plaintiff and damages assessed at $750 upon which judgment was entered.

Defendant ~~asks that this be reversed, contending that plaintiff's statement of claim does not disclose a cause of action in that it is too indefinite.~~ There were several letters between the parties leading up to the final order of March 27, 1913, which was sued in and is as follows:

"March 27th, 1913.

"C. L. Gray Lumber Co.,
"Meridian, Miss.

"Gentlemen:-

"We herewith place an order with you for 300,000 Ft. 3x6 at $21.50 per M. F.O.B. Cars Chicago, to be 12-14-16 feet long. This is for prospective work and we do not know the exact lengths in quantities we will need. This is to be held subject for call within six months.

"OTTO SCHAMMER.

"Agreed
"(Signed) C. L. GRAY LUMBER CO., per
"C. L. GRAY.

"Note: Any slight difference in the amount of quantity used more or less to be adjusted at the above price."

We see nothing indefinite about this order; it is clear as to amount, price, time of delivery and character

of materials. Whatever might be somewhat indefinite in the description of the materials to one not in the lumber business, appears to have a definite character from the previous letters of the parties and the testimony of witnesses engaged in handling lumber. The meaning of trade terms used in letters or contracts may always be explained by men experienced in the business. It was an agreement for practically a definite amount of lumber, to be taken within six months, in such quantities as defendant might order, and this comes within the rule laid down in Finch v. Zenith Furnace Co., 245 Ill. 586; Minnesota Lbr. Co. v. Leal Co., 160 Ill. 86; and National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427.

This is not a case of a contract to supply simply the needs of the purchaser; hence cases discussing that situation are not in point.

~~It was not error in~~ The court ~~to~~ refused to admit the evidence of Scharmer's bookkeeper, Miss Crane, as to a conversation between Scharmer and Gray. The alleged conversation is said to have taken place some two months after the contract was made. According to Scharmer, he only expressed doubt as to his ability to order lumber, as he was short of work. Even if Miss Crane had been permitted to corroborate him this would not amount to any modification or change in the contract or throw any light upon its construction.

There is no merit in the contention that the judge before whom the case was tried was disqualified. American Bridge Co. v. Lake Park Improvement Assn., 246 Ill. 589; Wesely v. Pribyl, App. Court No. 20834, opinion filed November 15, 1910, not yet reported.

The judgment was right and is affirmed.

AFFIRMED.

492 - 21890

MARY McCAUSLAND,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

198 I.A. 200

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries plaintiff had judgment for $5860 against defendant, on the verdict of a jury, and defendant prosecutes this appeal therefrom.

While thirty-three errors are assigned upon the record and many of them are argued by defendant, in the conclusion to which we have come it will be necessary for us to advert to but one phase of the case; we shall therefore rest our decision and judgment upon the fact as we find it - that plaintiff was not, at the time and place of the accident, in the exercise of due care for her own safety, but was, on the contrary, guilty of negligence which was the proximate cause of the accident and the resulting injuries to her.

Defendant operated at the time of the accident a line of electrically propelled street cars on South Halsted street, Chicago, the tracks upon which the cars were run being both north and south of Thirty-sixth street where it intersects South Halsted street. Plaintiff at the time of the accident intended to become a passenger upon a car of defendant running south from Thirty-sixth street, and with that purpose in mind stood, as she testified, about one foot west of the curb on the southwest corner of Halsted and Thirty-sixth streets. Plaintiff claims that she was struck while she was standing on the walk by the swaying, swerving or rocking of a south-bound car.

MR. JUSTICE [illegible] DELIVERED THE JUDGMENT OF THE COURT.

In an action for personal injuries (inter alia) and damages for loss of business earnings, on the ground of a fire, the plaintiff (respondent) sues appeal (partly).

While light-house stocks are assigned upon the record and many of them are engaged by plaintiff, in the condition of which we have spoken it will be necessary for us to advert to but one phase of the case; we shall therefore read our decision and judgment upon the fact as to fire in - that plaintiff was not, at the time the place of the accident, in the exercise of due care for her own safety, but was, in the contrary, guilty of negligence which was the proximate cause of the accident and the resulting injuries to her.

Defendant operated at the time of the accident a line of electricity propelled street cars on south Pulaski street. Cleaner, the street upon which her cars were run bisects both north and south of Thirty-ninth street where it intersects Lower Wabash avenue. Initially at the time of the accident intended to become a passenger upon a car of defendant running south from Thirty-ninth street, and with that purpose in view she, be the testified, about one foot west of the curb on the southwest corner of Indiana and Thirty-ninth streets. Simultaneously with her an eastbound car was standing on the walk by the curbing, awaiting or receiving of a south-bound car.

At the time of the accident defendant was rehabilitating and reconstructing its tracks on South Halsted street. This made it necessary for defendant to construct a temporary track on which to operate its cars during the period of reconstruction, which it did.

The south-bound temporary track, on which the car which struck plaintiff was running, was, according to the greater weight of the evidence on the subject, constructed about as follows: Ties were laid on the stone pavement about eighteen inches apart, with their ends ten inches outside the rail, and the rails were laid upon and spiked to each tie. There was ballast between the ties ample for a temporary track. Hardwood braces running from the west rail to the west curbstone were located one at each trolley pole and one or two in the spaces between the trolley poles, making the braces between fifty and sixty feet apart. These trolley poles were in the street near the curbstone. The west rail of this temporary track was about three-quarters of an inch higher than the east rail, which resulted from the placing of planks under the west end of the ties. During this reconstruction men were detailed to watch the temporary track for the purpose of keeping it surfaced, lined and gauged and solid and firm, so that it would safely sustain the weight of the cars as they passed along. The west rail was in the vicinity of four feet from the curbstone. The temporary track being placed upon the street, raised the rails perceptibly higher than the surface of the roadbed; while in permanent construction the rails are generally on a level with the surface of the street. To overcome this condition and to enable passengers to alight from and board the cars readily and without inconvenience, a temporary walk was laid down at the street intersections which ran from the west rail to the west curbstone

at the point where the accident to plaintiff occurred. It was also proven that the overhang of the cars running on defendant's track was from 22 to 24 inches on each side. The evidence does not sustain the contention of plaintiff that either the walk or the track at the point where the accident occurred was in a defective condition.

Plaintiff, a woman of mature years, a nurse in the office of a doctor at the southeast corner of Thirty-sixth and Halsted streets, according to her own testimony left the place of her employment at about 5:45 in the evening on the day of the accident, Sunday, October 29, 1911, and crossed Halsted street to the southwest corner of that street and Thirty-sixth street, with the purpose in mind of taking a south-bound car of defendant. She stood, as she testifies, on this corner about a foot west of the curb and was so standing when defendant's car came along and swayed and struck her, inflicting serious and painful injuries. Plaintiff had lived at 3601 South Halsted street for eleven years prior to the accident and during that time had been in the habit of riding on defendant's north-bound cars on week days and on its south-bound cars on Sundays. It must therefore be assumed that she was fairly well informed as to the operation of the cars, the condition of the roadway and the tracks of defendant at this point, and of the further fact that the south-bound cars had been running on a temporary track for a month prior to the Sunday she was hurt.

If plaintiff stood, as she testifies she did, one foot west of the curbstone, we think it clear from the distance between the west curbstone and the temporary track, that it was impossible, with due regard to the law of physics, for the car to sway, swerve or rock to such an extent from its centre of circumference as to strike plaintiff and still remain upon

at the point where the accident to plaintiff occurred. It was also proven that the overhang of the bars jutting as defendant's truck was from 12 to 14 inches on each side. The evidence does not establish the existence of plaintiff such either the walk or the track at the point where the accident occurred was in a defective condition.

PLAINTIFF, a woman of mature years, a nurse in the office of a dentist at the statehouse, center of Saint-Jean and United streets, desiring to her her habitually left the place of her employment at about 5:15 in the evening on the day of her accident, October, twelfth 19, 1933, and crossed Saint-Jean street to the southeast corner of that street and Thirty-sixth street, with the purpose in mind of taking a south-bound car of defendant. She stated, on the trial, on this corner about a foot west of the curb and was so standing when defendant's car came along and swerved and struck her, injuring her and jarring her. Plaintiff had lived at 5801 South United street for eleven years prior to the accident and during that time was been in the habit of taking an defendant's north-bound cars on each days and on its south-bound cars on Sunday. It must therefore be assumed that she was fairly well informed as to the operation of the cars, the conditions of her roadway and the tracks of defendant at this point, and of her further fact that the south-bound cars had been running on a temporary track for a month prior to the accident she met.

IT PLAINTIFF stated, as she testifies she did, she first met of the outbound, we think it clear from the distance between the west curbstone and the temporary track, that it was impossible, she she refund to the law of physics, for the car to pass, swerve or lean so much on account from the course of circumstances as to strike plaintiff and still remain upon

the track. It is somewhat of a strain upon our credulity to believe, notwithstanding the verdict of the jury, that the accident to plaintiff happened as she would have us believe it happened. There is no escape from the conclusion, as an ultimate fact, that plaintiff was not standing one foot west of the curbstone, but must have been east of it, and therefore stood so near the car that it struck her in passing. If her account as to the spot where she was standing is true and the car actually struck her, as she testifies, then the car so to do must have left the track - which neither party claims it did. She was undoubtedly, as the proof strongly tends to establish, struck by the front dashboard of the car and not by the body of the car after the fore part of it had passed her.

To stand so close to a moving car as to be struck by it is negligence. Beidler v. Branchaw, 200 Ill. 425.

In this condition of the evidence it is the duty of the reviewing court to reverse the judgment, (Siegmund v. Strackbein, 140 Ill. App. 484) and where, as here, it is patent that plaintiff cannot maintain the action, this court should reverse with a finding of fact. Borg v. N. W. I. & P. Ry. Co., 162 Ill. 348.

The injuries suffered by plaintiff resulted from her own negligence, which was the proximate cause of the accident. Such being the fact, the law inhibits a recovery, even though defendant was guilty of negligence which in some way may have contributed to bring about the accident, which could not have happened but for plaintiff's negligence. C. B. & Q. R. R. Co. v. Levy, 160 Ill. 385; W. C. G. R. R. Co. v. Liderman, 187 ibid 463; Beidler v. Branchaw, 200 ibid 425.

For the foregoing reasons the judgment of the Superior Court is reversed with a finding of fact.

the house. It is necessary, of a matter such as negligence, to
believe, notwithstanding the verdict of the jury, that the no-
ticeable or reasonably happened as one would have to believe it
happened. There is no escape from the conclusion, as an ultimate
fact, that LIABILITY was not absolutely one fact part of
the operation, but must have been part of it, and therefore
plead so that the fact is without law to possible. It has
occurred to me by the plot where one was absolutely in bare and the
our morally strong fact, as the facilities, then but not in
the most true fact the issue - which without such issues it
did. The one unnecessary, of the final liability cause be
essential, stated by the final handbook of the one and not
by the body or in our after the fine just if it was joined
fact.

To state an claim to a moving one as to be stated
by it is negligence. Holden v. Lawrence, one iii. 410.

In this condition of the evidence is in the duty
of the retaining court to instruct the jury. Lawrence v.
Stratton, 24 iii. 104. 104; the words, in part, is a joined
that plaintiff should maintain the action, this court finds
perhaps also a finding of fact. Jones v. C. & A. R. R. Co.,
120 iii. 548.

The instruction called for plaintiff requiring from
her own negligence, which was the proximate cause of the accident,
does seem the fact. The fact implies a question, when taking in-
tended the quality of negligence which is also, not yet have con-
siderable to state about the accident, which would not more sup-
posed the plaintiff's negligence. Chicago & Northwestern Ry.
Lacy, 24 iii. 453; C. & A. R. R. v. Lawrence, 24 iii. 104;
Gillis v. Lawrence, 24 iii. 104.

The two Federal rules the judgment of the in-
stance court be reversed with a finding of fact.

492 - 21890 FINDING OF FACT.

The court finds, as matter of fact, that the plaintiff was not at the time of the accident set forth in her declaration in the exercise of due care for her own safety, but was, on the contrary, guilty of negligence which was the proximate cause of the accident and the injuries resulting therefrom, and that defendant was not guilty of the negligence charged against it in plaintiff's declaration.

525 - 21923

ANTON J. CERMAK for the use of C. J. McCARTY,
Appellee,

vs.

THE GUGGENHEIM LAUNDRY MACHINERY CO. and CHARLES T. LUCKOW,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 202

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

~~This is an action upon a replevin bond,~~ In the bond defendants are principal and surety and the penalty is $1,500. The merits of the replevin suit in which the bond in suit was given were tried in the replevin action, the title to the goods replevined found to be in plaintiff and a writ of retorno habendo awarded.

This action was tried by the court, who found the issues for plaintiff and entered judgment against defendants for the penalty of the bond as debt and $583 damages, and defendants appeal.

The evidence of plaintiff consisted of the record and judgment in the replevin suit, including the affidavit in faith of which the writ was issued, evidence of the reasonable value of legal services necessarily rendered to plaintiff in the defense of the replevin suit and the court costs paid by plaintiff. The value of the goods replevined was sworn in the affidavit for replevin to be $750, and this amount, together with $125 attorney's fees and $8 costs disbursed by plaintiff in the replevin suit, made up the damages assessed by the trial Judge. ~~The correctness of these items is not in dispute.~~ Defendants rest their defense on the contentions that, because the property replevined had not been paid for, plaintiff was only entitled to recover attorney's-

fees and costs and nominal damages for the taking of the property under the replevin writ; and, further, that the Laundry Company offered to return the property. During the trial defendants, by leave, filed a plea of set off but before the conclusion of the trial withdrew it.

The ownership of the goods involved in the replevin suit was settled in that proceeding. As between the parties that question was res adjudicata and could not again be raised on the trial of the suit upon the bond. Hirma v. Muir, 152 Ill. App. 505. The pleadings involved neither the ownership of the replevined goods nor any indebtedness on their or any other account. While defendants contend that a settlement was negotiated with the attorney of plaintiff, all they proved was merely an abortive attempt to make a settlement. It was the duty of plaintiff in the replevin suit to return the goods replevined in accordance with the judgment in that suit, and it was not incumbent upon plaintiff to sue out a writ of retorno habendo as a condition precedent to his right to bring an action upon the replevin bond. Peck v. Wilson, 22 Ill. 205. An offer to return the goods unaccompanied by a tender is not a performance of the condition of the replevin bond, a compliance with or satisfaction of the judgment in the replevin suit.

The proofs of plaintiff conform to the procedure laid down in Kellogg v. Boyden, 126 Ill. 378, Richardson v. Gilbert, 135 Ill. App. 363, and other cases. There is no reversible error in this record.

Plaintiff has filed an additional abstract of the record and asks that the expense of same be taxed as costs against defendants. We do not think this request should be granted. The abstract filed was sufficient for this review and the additional abstract served no useful purpose.

Fees and costs and nominal damages for the taking of the property under the repleavin writ; and, further, that the Insurance Company offered to return the property, during the trial defendants, by their, filed a plea of set off set before the certiorari a/ the trial validated it.

The ownership of the goods involved in the replevin suit was written in such proceeding. As between the parties that question was res adjudicata and could not again be raised on the trial of the suit upon the bond. Aiken v. Ruir, 1b? 111. Ap. 3?6. The pleadings involved neither the ownership of the replevined goods nor any indebtedness or debt or any other account. While defendants contend that a settlement was negotiated with the attorney of plaintiff, all that proved was merely an abortive attempt to make a settlement. It was the duty of plaintiff in the replevin suit to return the goods replevined in accordance with the judgment in that suit, and it was not incumbent upon plaintiff to sue out a writ of replevin pendente as a condition precedent to his right to bring an action upon the replevin bond. Aiken v. Tilson, 4b 111. 3?3. An offer to return the goods accompanied by a tender in and a performance of the condition of the replevin bond, a compliance with or satisfaction of the judgment in the replevin suit.

The proofs of plaintiff conform to the pleadings and upon it Palmer v. Morgan, 1?6 111. 3?4, Hamilton v. Wilson, 1?? 111. App. 3?3, and other cases. There is no reversible error in this record.

Plaintiff has filed an additional abstract of the record and asks that the argument of cases be taken as such original defendants. We do not think this request should be granted. The abstract filed was sufficient for this review and the additional abstract moved to strike out.

Defendants should not be penalized for the discretion of their attorneys in putting into the abstract no more than was necessary for our review of the errors assigned and argued.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

553 - 21951

JOHN M. GAVIN,
Appellee,

vs.

STATE BANK OF MONTICELLO, INDIANA, a corporation,
Appellant.

APPEAL FROM
COUNTY COURT
OF COOK COUNTY.

198 I.A. 205

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against defendant to recover the amount of a certificate of deposit, with interest, issued by the defendant bank to Columbia Casualty Company, of which certificate plaintiff claimed to be the holder and owner by endorsement. The defenses pleaded by defendant and its affidavit of meritorious defense were on motion of plaintiff stricken from the files and the court proceeded, as in cases of default, to assess damages and enter judgment. From the judgment for $66.90 so entered defendant prosecutes this appeal.

The errors assigned here are the same as those assigned in Treadwell v. State Bank of West Lebanon, Indiana case General Number 21950, opinion this day handed down. As in the Treadwell case supra, we hold that the errors are well assigned, and for the reasons stated in that opinion the judgment of the County Court is reversed and the cause remanded for a trial under the issues joined before the striking of defendant's defenses from the files.

REVERSED AND REMANDED.

liability through this action against defendant to recover the amount of a certificate of deposit, with interest, issued by the defendant bank to Melville Dunnity Company, or else certificate plaintiff claims it to be the right and order of a stockholder. The facts pleaded by defendant and its affidavit of verification before were on motion of plaintiff stricken from the files and the court proceeded, as in cases of default, to assess damages and enter judgment. From the judgment for $66.00 as entered defendant prosecutes this appeal.

The errors assigned here are the same as those argued in Dunnity v. State Bank of Lake Lafayette, Indiana case decided October 1928, opinion this day handed down. As in the Dunnity case supra, we hold that the errors are well assigned, and for the reasons stated in that opinion the judgment of the county court is reversed and the cause remanded for a trial under the issues joined before the striking of defendant's answer from the files.

554 - 21952

CHARLES D. ALBRIGHT, Appellee,	APPEAL FROM
vs.	COUNTY COURT OF
FARMERS & TRADERS BANK OF LA FAYETTE, INDIANA, a corporation, Appellant.	COOK COUNTY.

193 I.A. 206

MR. JUSTICE MOLDON DELIVERED THE OPINION OF THE COURT.

In this cause a judgment was rendered upon the assessment of damages by the court, as in cases of default, in the sum of $213.16, in favor of plaintiff and against defendant, and defendant appeals.

The cause of action counted upon is a certificate of deposit in the sum of $198, with interest, issued by the defendant bank to the Columbia Casualty Company, title to which plaintiff claims by endorsement.

Defendant pleaded, among other defenses, the statutes of the State of Indiana governing negotiable instruments of the nature of the foregoing certificate, and also filed an affidavit of meritorious defense under said statutes and the interpretation thereof by the courts of Indiana. These defenses were eliminated by the court on motion of plaintiff, and such action of the court is assigned for error. We have held in Treadwell v. Central Bank of West Lebanon, General Number 21950, in an opinion this day handed down, that such error is well assigned, and for the reasons in that opinion stated the judgment of the County Court is reversed and the cause remanded for a trial under the issues joined before the striking of the defenses of defendant from the files.

REVERSED AND REMANDED.

610 - 22006

TOMASZ NARKIEWICZ,
Appellee,

vs.

VALENTINE WACHOWSKI,
Appellant.

APPEAL CIRCUIT COURT OF
COOK COUNTY.

193 I.A. 214

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This case is before the court for the second time. The judgment of the trial court in favor of plaintiff on a former trial was reversed for error in the admission in evidence of a written document against the objection of defendant. The decision on that appeal is reported in 183 Ill. App. 318, to which decision we refer for a statement of the material facts involved without here repeating them.

The record now before us is free from the error for which we reversed the former judgment. The fact that defendant breached his contract of sale with plaintiff, all the evidence on this subject considered, is sustained.

The remaining fact in controversy is as to the value, at the time defendant defaulted on his contract, of the real estate contracted to be sold by defendant to plaintiff. While the evidence on this question is in sharp conflict, an examination of it convinces us that the jury might well find from such evidence that the plaintiff had suffered damage to the amount of their verdict and that the real estate involved in the contract was reasonably worth, at the time defendant refused to carry out his contract with plaintiff, that much more than the contract price. We cannot find from the evidence that the verdict of the jury is contrary to its weight.

The motion of defendant to instruct a verdict in his favor was properly denied, as the questions raised by

the proofs were not of law for the court, but of fact for the determination of the jury. Whether the contract had been procured by the misrepresentations of plaintiff, was another one of the questions which the jury, by their verdict, decided adversely to defendant's contention, as also the claim of plaintiff that he had made a tender of performance and stood ready to carry out the terms of the contract on his part.

The contention of defendant regarding a representation by plaintiff that no broker had brought his attention to the property and consequently defendant was not liable for a broker's commission upon the sale, we think unimportant in view of the fact that plaintiff at all times stood ready to indemnify defendant against any claim for commission.

We fail to find in the instructions of the court to the jury any infirmity calling for a reversal of the judgment. Neither do we find that the conduct of counsel for plaintiff at the trial is subject to criticism which would warrant a reversal. We think the ruling of the court on the matters objected to was a sufficient curative. Furthermore, counsel for defendant fail to point out in their brief the particular conduct of counsel about which they complain, but refer the court for such particulars to the record. A court of review will never go to the record to search for evidence not specifically pointed out or argued, for the purpose of reversing the judgment of the trial court.

Two juries, as well as two trial Judges, have concluded that plaintiff's claim is meritorious, and without substantial and prejudicial error in procedure appearing in the record we would not be warranted in disturbing the judgment from which this appeal is prosecuted.

We are satisfied that there is no error in the record prejudicial to the rights of defendant, and the judgment of the Circuit Court is therefore affirmed. AFFIRMED.

22 - 20528

OSCAR TRYBON, Defendant in Error, vs. AUGUST W. MILLER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 215

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT

This action was commenced in the Municipal Court of Chicago on January 26, 1914, by Oscar Trybon, plaintiff, to recover for wages, overtime, and disbursements for car fare and telephone expenses. Plaintiff was hired by defendant about April 4, 1913, to solicit consents for granite paving. He ceased working for defendant on November 23, 1913. The cause was tried before the court without a jury resulting in a finding in favor of plaintiff for the sum of $359.50. The court allowed plaintiff's claim for balance of wages due, $290.40, and his claim for car fare and telephone expenses, $69.10, but did not allow his claim for $581.38 for overtime. Judgment was entered on the finding.

It is here contended by counsel for defendant that the judgment should be reversed and the cause remanded (1) because the amount allowed by the trial court for balance of wages due was excessive and against the weight of the evidence; (2) because the court should not have allowed plaintiff any sum for car fare and telephone expenses; and (3) because the court committed error in allowing plaintiff, over the objection of defendant, to read from an account or memorandum book, which plaintiff kept, containing items of amounts of wages received by him from time to time and of the number of hours of extra work performed by him on certain days

OSCAR TRYBON, Defendant in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
AUGUST W. MILLER, Plaintiff in Error.	

195 I.A. 215

MR. PRESIDING JUSTICE GRINNELL DELIVERED THE OPINION OF THE COURT

This action was commenced in the Municipal Court of Chicago on January 26, 1914, by Oscar Trybon, plaintiff, to recover for wages, overtime, and disbursements for car fare and telephone expenses. Plaintiff was hired by defendant about April 4, 1913, to solicit consents for granite paving. He ceased working for defendant on November 22, 1913. The cause was tried before the court without a jury resulting in a finding in favor of plaintiff for the sum of $309.36. The court allowed plaintiff's claim for balance of wages due, $280.40, and his claim for car fare and telephone expenses, $28.10, but did not allow his claim for $281.38 for overtime. Judgment was entered on the finding.

It is here contended by counsel for defendant that the judgment should be reversed and the cause remanded (1) because the amount allowed by the trial court for balance of wages due was excessive and against the weight of the evidence; (2) because the court should not have allowed plaintiff any sum for car fare and telephone expenses; and (3) because the court committed error in allowing plaintiff, over the objection of defendant, to read from an account or memorandum book, which plaintiff kept, containing items of amounts of wages received by him from time to time and of the number of hours of extra work performed by him on certain days

and of the disbursements made by him, and when made, for expenses.

In his amended statement of claim plaintiff claimed that he was entitled to receive as wages $80 for the month of April, $85 for each of the months of May, June, July, August, September and October and $65.40 for the month of November, or a total of $655.40; that he received from defendant from time to time during the months of April to September, inclusive, as wages, the total sum of $315, and that he also received from defendant on January 12, 1914, the sum of $50, leaving a balance due him of $290.40 for wages as distinguished from moneys due him for overtime and disbursements. The defendant, in his second amended affidavit of merits, admitted that plaintiff had earned as wages said total sum of $655.40, but claimed that from time to time up to and including January 12, 1914, he had paid plaintiff the total sum of $531, leaving only a balance due plaintiff for wages of $124.40. While the evidence is conflicting as to the payments made from time to time by defendant to plaintiff on account of wages, we can not say, after a careful review of the record, that the amount allowed by the court as the balance due plaintiff for wages is against the weight of the evidence.

On the question as to the allowance of plaintiff's claim for $69.10 for disbursements during the period of his employment for car fare and telephone expenses, defendant's evidence was to the effect that he at no time made any agreement with plaintiff to reimburse him for such expenses. While plaintiff testified that during the month of April, 1913, defendant gave him $2 for car fare and telephone expense, he also testified that he had no further conversation with defendant relative to such expenses and that at no time during his employment did he render any bill to defendant for such expenses. We fail to find in the record any evidence of an express promise

and of the disbursements made by him, and when made, for expenses.

From his amended statement of claim plaintiff claimed that he was entitled to receive as wages $80 for the month of April, $65 for each of the months of May, June, July, August, September and October and $65.40 for the month of November, or a total of $555.40; that he received from defendant from time to time during the months of April to September, inclusive, as wages, the total sum of $315, and that he also received from defendant on January 12, 1914, the sum of $80, leaving a balance due him of $290.40 for wages as distinguished from moneys due him for overtime and disbursements. The defendant, in his second amended affidavit of merits, admitted that plaintiff had earned as wages said total sum of $555.40, but claimed that from time to time up to and including January 12, 1914, he had paid plaintiff the total sum of $331, leaving only a balance due plaintiff for wages of $124.40. While the evidence is conflicting as to the payments made from time to time by defendant to plaintiff on account of wages, we can not say, after a careful review of the record, that the amount allowed by the court as the balance due plaintiff for wages is against the weight of the evidence.

On the question as to the allowance of plaintiff's claim for $89.10 for disbursements during the period of his employment for car fare and telephone expenses, defendant's evidence was to the effect that he at no time made any agreement with plaintiff to reimburse him for such expenses. While plaintiff testified that during the month of April, 1913, defendant gave him $2 for car fare and telephone expense, he also testified that he had no further conversation with defendant relative to such expenses and that at no time during his employment did he render any bill to defendant for such expenses. It fail to find in the record any evidence of an express promise

on the part of defendant to reimburse plaintiff for disbursements for car fare and telephone, and there is not sufficient evidence from which such a promise may be implied. In our opinion the court was not warranted in including in the finding and judgment the sum of $69.10 for car fare and telephone expenses.

As to the court allowing plaintiff to read from an account or memorandum book kept by him, we do not think that, in view of plaintiff's evidence, any prejudicial error was committed in this regard. (Diamond Glue Co. v. Kietzychowski, 227 Ill. 338, 347; Richardson Fueling Co. v. Seymour, 235 Ill. 319, 323.)

Our conclusion is that the finding and judgment are excessive to the extent of $69.10. If within ten days defendant in error files a remittitur in the sum of $69.10 the judgment of the Municipal Court will be affirmed for the sum of $290.46; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

on the part of defendant to reimburse plaintiff for disbursements for car fare and telephone, and there is not sufficient evidence from which such a promise may be implied. In our opinion the court was not warranted in instructing in the finding and judgment the sum of $25.15 for car fare and telephone expenses.

As to the court allowing plaintiff to read from an account or memorandum book kept by him, we do not think that, in view of plaintiff's evidence, any prejudicial error was committed in this regard. (Diamond Glue Co. v. Nielsen-Lowman, 247 Ill. 328, 347; Interurban Trucking Co. v. Kommer, 258 Ill. 310, 325.)

Our conclusion is that the finding and judgment are reversible on the ground of jurisdiction. It appears from the record in error filed a remittitur in the sum of $25.15 the judgment of the municipal court will be affirmed for the sum of $200.40; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED OR REMITTITUR.

284 - 20612

THE RIENZI COMPANY

vs.

THE COMMISSIONERS OF LINCOLN PARK and CHARLES E. AFFELD,

On Appeal of CHARLES E. AFFELD.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

198 I.A. 233

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is the separate appeal of Charles E. Affeld from the decree ~~of the~~ against him Superior Court of Cook County, entered ~~March~~ 13, 1914. For the reasons stated in the opinion in case No. 20574, this day filed, said decree is reversed and the cause remanded with directions to dismiss the cross-bill of The Commissioners of Lincoln Park for want of equity and to enter a decree in favor of The Rienzi Company, complainant, in accordance with the prayer of its bill as amended.

REVERSED AND REMANDED WITH DIRECTIONS.

This is the separate appeal of Charles A. Affeld from the decree of the superior Court of Cook County, entered March 1, 1918. For the reasons stated in the opinion in case No. 8077, this day filed, said decree is reversed and the cause remanded with directions to dismiss the cross-bill of the Commissioners of Lincoln Park for want of equity and to enter a decree in favor of the Miami Company, complainant, in accordance with the prayer of its bill as amended.

Reversed and remanded with directions.

73 - 21042

CHARLES C. O'NEILL,
Defendant in Error,

vs.

OSCAR METZ,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

198 I.A. 234

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

Action by Charles C. O'Neill, plaintiff, ~~Plaintiff brought suit~~ ~~in the Municipal Court of Chicago~~ against Oscar Metz, defendant to recover ~~the~~ balance due, ~~viz.~~ $90, on the sale to defendant of one second hand steam boiler and four second hand steam radiators at the agreed price of $100, of which $10 had been paid by defendant. From a judgment in favor of plaintiff, defendant appeals. In his affidavit of merits defendant set up ~~as a~~ defense that plaintiff expressly warranted that the goods were "sound and fit for the purpose of using the same in defendant's building," that defendant relied upon the warranty and paid plaintiff $10 as part of the purchase price, and ~~that~~ after ~~the~~ delivery and installation ~~of the goods~~ in defendant's building they were found to be unsound and unfit for said purpose and of no value to defendant. ~~The cause was tried before the court without a jury resulting in a finding and judgment for $90 against defendant.~~

We have examined the evidence and are of the opinion that the finding and judgment were fully warranted. While the evidence was conflicting, we cannot say that defendant showed by a preponderance of the evidence that plaintiff made any express warranty as to soundness and fitness of the goods, upon which defendant relied, and that the goods were of no value to defendant. And under the facts disclosed there can be no implied warranty. (Ram-

OSCAR MEYER, Plaintiff in Error,	
vs.	
[illegible] C. O'Neill, Defendant in Error.	

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1954 I.A. 234

MR. PRESIDING JUSTICE SCHLEGEL
DELIVERED THE OPINION OF THE COURT.

[illegible]

[illegible] Chicago against defendant to recover the balance due, viz., $90, on the sale to defendant of one second hand steam boiler and four second hand steam radiators at the agreed price of $100, of which $10 had been paid by defendant. In his affidavit of merits defendant set up defense that plaintiff expressly warranted that the goods were "sound and fit for the purpose of using the same in defendant's building," that defendant relied upon the warranty and paid plaintiff $10 as part of the purchase price, and that after the delivery and installation of the goods in defendant's building they were found to be unsound and unfit for said purpose and of no value to defendant. The cause was tried before the court without a jury resulting in a finding and judgment for pro-rata defendant.

We have examined the evidence and are of the opinion that the finding and judgment were fully warranted. While the evidence was conflicting, we conclude and that defendant showed by a preponderance of the evidence that plaintiff made no express warranty as to soundness and fitness of the goods, upon which defendant relied, and that the goods were of no value to defendant. And under the facts disclosed there can be no implied warranty. (Ram-

ming v. Caldwell, 43 Ill. App. 175, 179; Martin & Co. v. Roehm, 92 Ill. App. 87.) And we do not think that the court erred in his rulings on evidence. The judgment is affirmed.

AFFIRMED.

173 - 21150

MERRICK BUSH,
Defendant in Error,

vs.

FARRINGTON AUTOMOBILE COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

198 I.A. 240

MR. PRESIDING JUSTICE GRIDLEY
DELIVERED THE OPINION OF THE COURT.

In this case plaintiff's claim was for commissions due him as an automobile salesman employed by defendant on three separate sales of automobiles. One of the sales was to a man named Erncke on which sale plaintiff claimed, and defendant admitted, a balance of $50 due plaintiff. Another sale was to a man named Blair on which sale plaintiff claimed a commission of $127.50. The third sale was to a man named Tydings on which sale plaintiff claimed that defendant agreed to pay him "$100 if defendant should be able to enforce the sale, or $50 if the deal did not go through." The defendant denied owing plaintiff anything on the Blair and Tydings sales and claimed a set-off of $131.30 for the expense of making repairs on a certain car which had been damaged because of the unskillful driving of the same by a prospective customer, during a "demonstration" of the car, permitted by plaintiff. The case was tried before a jury who returned a verdict for plaintiff in the sum of $210, upon which verdict judgment against the defendant was entered. Both counsel agree that the jury in arriving at their verdict allowed plaintiff $50 on the Erncke sale, $110 on the Blair sale and $50 on the Tydings sale, and disallowed, in toto, defendant's claim of set-off. Plaintiff was the only witness on his own

AMERICAN BUGGY,
Defendant in Error,

vs.

WASHINGTON AUTOMOBILE COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1981A.240

MR. PRESIDING JUSTICE DUFFY
DELIVERED THE OPINION OF THE COURT.

In this case plaintiff's claim was for commissions due him as an automobile salesman employed by defendant on three separate sales of automobiles. One of the sales was to a man named Brooks on which sale plaintiff claimed, and defendant admitted, a balance of $50 due plaintiff. Another sale was to a man named Blair on which sale plaintiff claimed a commission of $127.50. The third sale was to a man named Tydings on which sale plaintiff claimed that defendant agreed to pay him "$100 if defendant should be able to enforce the sale, or $50 if the deal did not go through." The defendant denied owing plaintiff anything on the Blair and Tydings sales and claimed a set-off of $121.50 for the expense of making repairs on a certain car which had been damaged because of the unskillful driving of the same by a prospective customer, during a "demonstration" of the car, permitted by plaintiff. The case was tried before a jury who returned a verdict for plaintiff in the sum of $210, upon which verdict judgment against the defendant was entered. Both counsel agree that the jury in arriving at their verdict allowed plaintiff $50 on the Brooks sale, $110 on the Blair sale and $50 on the Tydings sale, and disallowed, in toto, defendant's claim of set-off. Plaintiff was the only witness on the ques

behalf in making his case in chief. The principal witness for defendant was William H. Farrington, president of defendant. The testimony of these two witnesses was very conflicting on material points. ~~We deem it unnecessary, however, to discuss their testimony in detail.~~ A bookkeeper of defendant and an employe of defendant in its repair department also testified for defendant. Plaintiff and two other witnesses in his behalf gave testimony in rebuttal.

Counsel for defendant contend that the verdict of the jury in allowing plaintiff any commissions on the Blair and Tydings sales is against the weight of the evidence. The repeated argument seems to be that plaintiff did not have a preponderance of the evidence because his testimony was overcome by the testimony of one witness for the defendant on many material points. We cannot agree with the contention or the argument. We cannot say after careful consideration that the verdict is manifestly against the weight of the evidence. It is not the law that if the number of witnesses on each side of an issue is equal the evidence is therefore evenly balanced and that he who has the affirmative of the issue must fail. (Henderson v. Blakesley, 186 Ill. App. 356.) And the mere fact that more witnesses testified on one side than on the other does not, of itself, determine the weight of the evidence. (Goodman v. Weinberger, 185 Ill. App. 167; Krasa v. Robbins, 186 Ill. App. 198; Bishop v. Busse, 69 Ill. 403.)

And we cannot say that the verdict of the jury in disallowing defendant's claim of set-off was unwarranted.

Counsel also contend that the court in his oral charge to the jury committed error prejudicial to defendant. We have examined the charge and are of the opinion that the jury were fairly and correctly instructed. And we do not think that the court erred in refusing to charge the jury as

bondif in making his case in chief. The principal witness for defendant was William H. Harrington, president of defendant. The testimony of these two witnesses was very conflicting on material points. It seems unnecessary, however, to discuss their testimony in detail. A bookkeeper of defendant and an employe of defendant in its repair department also testified for defendant. Plaintiff had two other witnesses in his behalf gave testimony in rebuttal.

Counsel for defendant contend that the verdict of the jury in allowing plaintiff any compensation on the Blair and Tydings sales is against the weight of the evidence. The repeated argument seems to be that plaintiff did not have a preponderance of the evidence because his testimony was overcome by the testimony of one witness for the defendant on many material points. We cannot agree with the contention or the argument. We cannot say after careful consideration that the verdict is manifestly against the weight of the evidence. It is not the law that if the number of witnesses on each side of an issue is equal the evidence is therefore evenly balanced and that he who has the affirmative of the issue must fail. (Henderson v. Blakeslee, 180 Ill. App. 522.) And the mere fact that more witnesses testified on one side than on the other does not, of itself, determine the weight of the evidence. (Goodman v. Leinbenger, 180 Ill. App. 167; Kraus v. Hopkins, 180 Ill. App. 160; Bishop v. Busse, 69 Ill. 402.)

And we cannot say that the verdict of the jury in disallowing defendant's claim of set-off was unwarranted.

Counsel also contend that the court in his oral charge to the jury instructed error prejudicial to defendant. We have examined the charge and are of the opinion that the jury were fairly and correctly instructed. And we do not think that the court erred in refusing to charge the jury as

requested by defendant, or that the court committed any prejudicial error in his rulings on evidence.

Finding no reversible error in the redord the judgment of the Municipal Court will be affirmed.

AFFIRMED.

2 - 19492

KARL PUSWASKIS,
Defendant in Error,

vs.

CONRAD SEIPP BREWING COMPANY,
a corporation, and MATH KERSTING,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 247

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~This was an~~ action brought to recover $750, alleged to be money had and received by defendants without consideration. The verdict for $641.67 was not only inconsistent with any legitimate theory of the evidence but against the weight thereof on the question of joint liability, thus necessitating a reversal of the judgment.

It appeared that Kersting executed a written lease of certain premises to Puswaskis to be used for saloon purposes, ~~It was~~ dated Jan. 30, 1911, ~~and was~~ for a period from Feb. 20, 1911 to April 30, 1916, at a rental of $100 per month. Attached thereto evidently as a part thereof was a separate paper by which the lessee covenanted with the lessor to use in and about said premises only such draught beer as the lessor might designate, the price to be $5 per barrel. On Feb. 8, 1911, Kersting (who was manager of said Brewing Co.) on the company's writing paper containing its letter head, wrote Puswaskis, and referring to the lease "between us" designated said Company's beer as the beer to be used on the premises. ~~There is nothing in that letter or the lease that is ambiguous as to the contractual relations of the parties or the nature of their contract, or that justifies any other construction than that Kersting~~

CARL KERSTING,
Defendant in Error,

vs.

CHICAGO DIRECT HEATING COMPANY,
a corporation, and SAM KERSTING,
Plaintiffs in Error.

MINOR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT:

This was an action brought in replevin (YAR) against to be money had and received by defendants without consideration. The verdict for $641.67 was not only inconsistent with any logicable theory of the evidence but against the weight thereof on the question of joint liability. Thus necessitating a reversal of the judgment.

It appeared that Kersting executed a written lease of certain premises to Pneumatic to be used for saloon purposes, it was dated Jan. 30, 1931, and was for a period from Feb. 20, 1931 to April 30, 1932, at a rental of $100 per month. Pneumatic thereto evidently as a part thereof was a generate power by which the lessee conducted with the lessor to use in and about said premises only such draught beer as the lessor might designate, the price to be 45 per barrel. On Feb. 8, 1931, Kersting (who was manager of said Kersting Co.) on the company's writing paper containing the letter head, wrote Pneumatic, and referring to the lease "between us" designated said Company's beer as the beer to be used on the premises. There is nothing in that letter or the lease that is ambiguous as to the contractual relations of the parties as the nature of their contract, or that indicates any other construction than that intended

~~was contracting in his personal~~ capacity.

On March 1, 1911, he again wrote Puswaskis a letter, which he signed as manager, in which he refers to said provision fixing the price of the beer and to a verbal understanding that it might vary with the revenue tax, and asked for confirmation of such understanding. ~~This letter he signed as manager of the company.~~ Taken with the previous letter its purport is plain, namely, that having exercised his personal right contracted for to designate whose beer should be used, and having designated that of the company of which he was manager, he thereby sought in his capacity as such manager to have a binding contract between the company as seller and Puswaskis as purchaser of the beer. No question arises here as to the price therefor.

These facts are material only as they affect the question whether there was a joint liability on the part of defendants for $500 paid by Puswaskis to Kersting in addition to the rent paid under the lease, and for $250 paid the Brewing Company for a saloon license for a period anterior to Puswaskis' occupation of the premises.

An arrangement for the lease was made on Jan. 23, 1911. A memorandum of it, signed by Kersting and given to Puswaskis, is to the effect that the latter was to pay the former a bonus of $500 for said lease, and that he then made a part payment of $150 thereon, and would pay the balance in two installments, which were subsequently paid to Kersting. ~~There is no ambiguity in the memorandum, and~~ That the said sum was to be paid as a "bonus," as stated therein, was corroborated by Kersting and another witness' account of the verbal conversations at the time said receipt or memorandum was given. Against ~~such~~ which interpretation ~~is~~ there

On March 1, 1911, he sent to Pawsenin a letter in which he referred to said provision fixing the price of the beer and to a verbal understanding that it might vary with the revenue tax, and asked for confirmation of such understanding. This letter he signed as manager of the company. Later with the previous letter the purpose is clear, namely, that having established his personal right substituted for it readjusts about beer should be made, and having designated that of the company of which he was manager, it intended to be bound by such manager to have a similar meeting between the manager as saloon and Pawsenin is purchaser of the beer. The question arises here as to the prior dispute.

These facts and material only in they affect the question whether there was a joint liability on the part of defendants for 1000 paid by Pawsenin to Ivanjin in addition to the 2000 paid under the lease, and for 4000 paid the brewing Company for a saloon license for a period beyond by Pawsenin' acquisition of the premises.

An agreement for the lease was made on Jan. 26, 1911. A memorandum of it, signed by Ivanjin and given to Pawsenin, is to the effect that the latter was to pay the former a bonus of 1000 for said lease, and that he then made a part payment of 400 thereon, and would pay the balance in two instalments, which were subsequently paid to Ivanjin. There is no ambiguity in the memorandum, and that the said was to be paid as a "bonus," as stated therein, was corroborated by Ivanjin and another witness' account of the verbal conversations at the time said for right of possession was given. Pawsenin's interpretation in

Copy to here only

Puswaskis' evidence that the money was to pay for "bonds." There was no evidence corroborative of his understanding, and it is contrary to the instrument in writing which he took as expressing the arrangement. The manifest weight of the evidence is that the money was paid to Kersting in accordance with a personal contract in which the Brewery had no direct interest, and hence against the theory of joint liability on which the judgment rests. This alone renders necessary a reversal of the judgment, which includes said sum or a part thereof.

It is unnecessary therefore to consider the evidence pertaining to the license money. But the record indicates, that even though it were recoverable, there is no joint liability therefor, as it appears to have been paid to and for said Company, and that Kersting is not liable therefor.

REVERSED AND REMANDED.

42 - 20807

WILLIAM A. NAVIGATO, for use of Virgilio Cimino, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
ALESSANDRO MELONE and ANGELA MELONE, Plaintiffs in Error.	

193 I.A. 249

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a garnishment proceeding based on an indebtedness of $500 from Navigato to Cimino, the usee, and a claim of indebtedness of $250 for an earned and unpaid real estate commission due from the Melones to Navigato.

The case was tried before the court without a jury. The judgment and finding were in favor of Navigato for $250, and it is contended that they were contrary to law and the evidence.

The transcript of the evidence is certified to as a statement of the facts. Whether it be regarded as the former or the latter it sufficiently indicates that a commission of $250 was due and unpaid from the Melones to Navigato. Apparently no evidence was offered to the contrary. Defendants did not deny that they had agreed to pay such a commission or claim that they had paid it, but merely introduced a so-called receipt signed by Navigato, which reads "Received a commission of $250 <u>to be paid</u>" etc. It is apparent from such paper and the explanation of it by Alessandro Melone himself, the only witness for defendants, that it was offered to show the amount and not the payment of the commission agreed upon.

WILLIAM A. NAVIGATO, for
use of Virginia Cimino,
Defendant in Error,

vs.

ALEXANDRO NIGRONI and
ANDREA NIGRONI,
Plaintiffs in Error.

MOTION TO
DISMISS WRIT
OF ERROR.

MR. JUSTICE MARKS DELIVERED THE OPINION OF THE COURT.

This was a garnishment proceeding based on an indebtedness of $250 from Navigato to Cimino, the wife, and a claim of indebtedness of $250 for an earned and unpaid real estate commission due from the vendors to Navigato.

The case was tried before the court without a jury. The judgment and finding were in favor of Navigato for $250, and it is contended that they were contrary to law and the evidence.

The transcript of the evidence is certified to as a statement of the facts. Whether it be regarded as the former or the latter it sufficiently indicates that a commission of $250 was due and unpaid from the vendors to Navigato. Apparently no evidence was offered to the contrary. Defendants did not deny that they had agreed to pay such a commission or claim that they had paid it, but merely introduced a so-called receipt signed by Navigato, which reads "Received a commission of $250 to be paid" etc. It is apparent from such paper and the explanation of it by Lawrence Cimino himself, the only witness for defendants, that it was offered to show the amount and not the payment of the commission earned upon

The real question presented here is the right of action in Navigato. The commission was contracted to be paid to Navigato and his partner. The latter assigned his interest therein to the former. It is claimed that the partner was a necessary party to the suit, and decisions rendered before the passage of section 18 of the Practice Act, are cited. Under that section, however, Navigato as the assignee of the chose in action had the right to sue thereon in his own name.

AFFIRMED.

The real question presented here is the right of action in Bevigato. The commission was constructed to be paid to Bevigato and his partner. The latter assigned his interest therein to the former. It is claimed that the partner was a necessary party to the suit, and decisions rendered before the passage of section 15 of the practice act, are cited. Under that section, however, Bevigato as the assignee of the chose in action had the right to sue thereon in his own name.

(CONTINUED).

161 - 21138

LEWIS RINAKER and GUSTAVE E. BEERLY, Defendants in Error, vs. AMERICAN BOND & MORTGAGE CO., Plaintiff in Error.	) ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 252

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~Defendants in error~~ Petitioners were employed by one Tiny Johnson to prosecute a claim against ~~plaintiff in error~~ American Bond & Mortgage Co. One of them acting for his firm did considerable work to effect a settlement of the claim before bringing suit therefor. A suit was finally commenced in which his said firm and another firm (the attorneys for ~~plaintiff in error~~ the American Bond & Mortgage Company in this appeal) appeared as attorneys of record. Most if not all of the work connected with the litigation thereafter was conducted by the latter firm resulting in ~~a~~ judgment against ~~plaintiff in error~~ American Bond & Mortgage Company for $2650.

After commencement of the suit and prior to the rendition of the judgment, ~~defendants in error~~ the petitioners served ~~a~~ notice in due form on ~~plaintiff in error~~ said judgment debtor of their claim to an attorney's lien under the statute for the services they had performed and were to perform in the matter and filed an intervening petition in said cause to enforce said lien. On the hearing thereof ~~plaintiff in error~~ the American Bond & Mortgage Co. was ordered adjudged and directed to pay ~~defendants in error~~ petitioners $150.

There was ~~ample~~ evidence that the services rendered by ~~defendants in error~~ petitioners were worth that sum. The ~~only real contention here is~~ It was contended that the contract between

LEWIS RIMANEK and GUSTAVE S. [illegible], Defendants in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
AMERICAN BOND & MORTGAGE CO., Plaintiff in Error.	

MR. JUSTICE MACNAMARA DELIVERED THE OPINION OF THE COURT.

Defendants-in-error were employed by one Tiny Johnson to prosecute a claim against plaintiff in error. One of them acting for his firm did considerable work to effect a settlement of the claim before bringing suit therefor. A suit was finally commenced in which his said firm and another firm (the attorneys for plaintiff-in-error) appeared as attorneys of record. Most if not all the work connected with the litigation thereafter was conducted by the latter firm resulting in a judgment against plaintiff-in-error for $2650.

After commencement of the suit and prior to the rendition of the judgment, defendants-in-error served a notice in the form on plaintiff-in-error of their claim to an attorney's lien under the statute for the services they had performed and were to perform in the matter and filed an intervening petition in said cause to enforce said lien. On the hearing thereof plaintiff-in-error was ordered adjudged and directed to pay defendants-in-error [illegible].

There was ample evidence that the services rendered by defendants-in-error were worth that sum. The only real contention here is that the contract between

~~defendants in error~~ petitioners and said Johnson called for an entire service, including prosecution of the suit, and that they abandoned the contract and thereby lost all right to compensation. This ~~arises~~ arose over the fact that the other legal firm was called in to aid defendants in error about the time the suit was commenced and conducted the trial without assistance from ~~defendants in error~~ petitioners. ~~But we do not think such fact defeated the right of defendants in error to compensation for such services as they had rendered in the matter or constituted proof of abandonment of their contract.~~ Apparently the other firm was expected to conduct the trial, ~~At any~~ but rate it ~~does~~ did not appear that ~~defendants in error~~ petitioners did not perform all the services their client expected of them.

As the services they rendered were on account of such claim and cause of action they were such as clearly come within the purview of the statute giving a lien therefor.

AFFIRMED.

defendants in error and said Johnson & Ilsi for an entire service, including prosecution of the suit, and that they abandoned the contract and thereby lost all right to compensation. This applies over the fact that the other legal firm was called in by said defendants in error right the time the suit was commenced and conducted the trial without assistance from [illegible] however. We do not think such fact defeated the right of defendants in error to compensation for such services as they had rendered in the matter or constituted proof of abandonment of their contract. Apparently the other firm was employed to conduct the trial. At any rate it does not appear that defendants in error did not perform all the services their client expected of them.

As the services they rendered were on account of such claim and cause of action they were such as clearly come within the purview of the statute giving a lien thereon.

AFFIRMED.

197 - 21174

JACOB HORVITZ, Defendant in Error, vs. NATHAN SHANFELD, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 254

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~This was an~~ Action of forcible detainer, by Jacob Horvitz, plaintiff, against Nathan Shanfeld. The Court directed a verdict for plaintiff and gave judgment for possession of the premises, from which defendant appeals.

The lease under which Nathan Shanfeld held the defendant held the premises was in writing and under seal. The rent was payable monthly in advance and had been paid from time of entry until November, 1914. Defendant refusing to pay the rent for that month on demand therefor, a five days notice was duly served, and on November 11, a suit for forcible detainer was begun in the Municipal Court of Chicago, and on account of failure to pay the December rent on demand therefor made December 14, the suit at bar, without further notice, was begun December 16, 1914. After institution of and before judgment in the suit at bar plaintiff took a non-suit in the former. Defendant asked for dismissal of the latter suit because the former was pending when the suit at bar was begun. The motion was properly denied (Wright v. Keifer, 131 Ill. App. 298).

At the trial the grounds of defense were (1) that defendant had not been given complete possession of the premises leased, he claiming that a room of the basement had been withheld from him and contained goods of the plaintiff which plaintiff on request had failed to remove;

JACOB MORVITZ,
Defendant in error,

vs.

HERMAN SHAPIRO,
Plaintiff in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

This was an action of forcible detainer. The Court directed a verdict for plaintiff and gave judgment for possession of the premises.

The lease under which defendant held the premises was in writing and under seal. The rent was payable monthly in advance and had been paid from time of entry until November, 1914. Defendant refusing to pay the rent for that month on demand therefor, a five days notice was duly served, and on November 13, a suit for forcible detainer was begun in the Municipal Court of Chicago, and on account of failure to pay the December rent on demand therefor November 14, the suit at bar, without further notice, was begun December 16, 1914. After institution of and before judgment in the suit at bar plaintiff took a non-suit in the former. Defendant asked for dismissal of the latter suit because the former was pending when the suit at bar was begun. The motion was properly denied (Wright v. Lefler, 141 Ill. App. 308).

At the trial the grounds of defense were (1) that defendant had not been given complete possession of the premises leased, he claiming that a room of the basement had been withheld from him and contained goods of the plaintiff which plaintiff on request had failed to remove;

and (2) that when he paid the October rent plaintiff made a verbal agreement that he could stay and pay no more rent until plaintiff gave him possession of the basement. But his first defense fell on his admission that before the suit at bar was begun, plaintiff put a lock on the basement and left the key with him, which he refused to take because plaintiff had not removed said goods therefrom. In view of such delivery of the key to the room and uncontradicted evidence that defendant refused to permit the removal of the goods therefrom by plaintiff's agent sent there to remove them, the defense of want of possession was without foundation.

As to the other defense, not only was the agreement, if made, "without any consideration to support it - a mere nudum pactum." (Goldsborough v. Gable, 140 Ill. 269) but "so long as the contract contained in the lease under seal remained executory, the plaintiff had the right to repudiate the parol agreement and claim the full amount of rent contracted for." (Snow v. Griesheimer, 220 id. 106).

As there was no evidence that warranted a finding of the issues of fact for the defendant the verdict was properly directed unless there was error at law. We find none in the rulings of the court and no instructions are complained of. The contention that the lease was terminated by bringing the action that was dismissed and that the new suit would not lie until after a notice to quit under the statute, is not tenable, as the terms of the lease expressly waive notice and demand, and hence none was necessary. (Upton et al. v. Hinchliffe, 131 Ill. 468).

The overruling of the oral motion for new trial at the close of the case without allowing additional time for its presentation, deprived defendant of no right and was no abuse of discretion.

AFFIRMED.

284 - 21202

AUGUSTA ALBRECHT, et al.,
Plaintiffs in Error,

vs.

JOSEPH PINGER, et al.,
Defendants in Error.

193 I.A. 257

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~This was an~~ action brought under ~~section 9 of the~~ Dramshop Act, ~~Chapter 43 of our revised statutes.~~ The verdict and judgment ~~were~~ for defendants, ~~who are defendants in error here.~~ Plaintiffs in error rely wholly on alleged ~~errors in given instructions to the jury.~~

The record contains no evidence nor a certificate of the trial judge as to what ~~it~~ tended to prove, nor anything by which ~~we can determine~~ the applicability of the instructions complained of. ~~They present~~ mere abstract questions of law, ~~which, in view of such omissions from the record,~~ we would not be justified in reviewing unless we can say that the instructions were vicious under any and all circumstances. We do not think we can so say, even though many of the criticisms against the instructions have merit. For instance, they were apparently too numerous and were cumulative in character, and perhaps subject to condemnation for prolixity and reiteration, and other respects. But without knowledge of the quantity or quality of evidence relied on to sustain the cause of action, we can not say that the errors complained of were reversible. For aught the record shows to the contrary the court may have been justified in directing a verdict for defendants. In such a case it would be immaterial what the instructions were.

INDUSTRIAL COMM. et al.,
Plaintiffs in error,

vs.

JOHN PINE, et al.,
Defendants in error.

1931 I.A. 257

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT:

This was an action brought under section 9 of the Workmen's Compensation Act, chapter 48 of our revised statutes. The verdict and judgment were for defendants, who are defendants in error here. Plaintiffs in error rely wholly on alleged errors in given instructions to the jury.

The entire evidence introduced was a certificate of the trial judge as to what it tended to prove, and anything by which we can determine the applicability of the instructions complained of. These present more abstract questions of law, which, in view of such omissions from the record, we would not be justified in reviewing unless we can say that the instructions were violations under any and all circumstances. We do not think we can so say, even though many of the criticisms against the instructions have merit. For instance, they were apparently too numerous and were cumulative in character, and perhaps subject to condemnation for prolixity and reiteration, and other reasons. But without knowledge of the quantity or quality of evidence tended to sustain the cause of action, we can not say that the errors complained of were reversible. For aught the record shows to the contrary the court may have been justified in directing a verdict for defendants. In such a case it would be immaterial what the instructions were.

But we have examined those complained of, and find no justification in a reversal on the ground that they materially deviate from a correct statement of abstract law, or were manifestly prejudicial on any theory or facts of the case.

Plaintiffs relied wholly in their appeal on alleged erroneous instructions to the jury. One instruction tells the jury that in weighing the evidence of plaintiffs they may take into consideration their interest, but as there is nothing in the record to show any defendant testified the instruction was not necessarily discriminating or erroneous. Another is complained of because it used the word "create" instead of the statutory word "cause;" another, because it contained the alternative phrase "or did not for any other reason cause habitual intoxication"; another, because of a similar phrase and mere surplusage; another, because it added unnecessarily to the statutory words "in whole or in part", the words, "the immediate and proximate cause or sustaining cause of such intoxication"; and others, because they were argumentative, or did not clearly and concisely state the law.

It would subserve no useful purpose to incorporate in this opinion for the purpose of criticism and more exact analysis these numerous and rather lengthy instructions. It is enough to add that we can not say that any of them is so apparently vicious and erroneous that the judgment would be reversed regardless of any state of the record. It will therefore be affirmed.

AFFIRMED.

We have examined those complained of, and find no justification in a reversal on the ground that they materially deviate from a correct statement of the law, or were manifestly prejudicial on any theory of facts of the case.

The instruction tells the jury that in weighing the evidence of plaintiffs they may take into consideration their interest, but as there is nothing in the record to show any defendant justified the instruction was not necessarily misleading or erroneous. Another is complained of because it uses the word "errors" instead of the statutory word "cause;" another, because it contained the alternative phrase "or did not for any other reason cause material injury"; another, because of a similar phrase and more surplusage; another, because it added unnecessarily to the statutory words "in whole or in part", the words, "the immediate and proximate cause or sustaining cause of such injury"; and others, because they were argumentative, or did not clearly and concisely state the law.

It would subserve no useful purpose to incorporate in this opinion for the purpose of criticism and more exact analysis these numerous and rather lengthy instructions. It is enough to said that we can not say that any of them is so apparently vicious and erroneous that the judgment would be reversed regardless of any state of the record. It will therefore be affirmed.

AFFIRMED.

258 - 21240

HENRY E. STRASSHEIM and ADOLPH S. BOERICKE, as HENRY E. STRASSHEIM & CO., Defendants in Error, vs. JOHN C. REUTTINGER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 258

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendants in error and plaintiff in error were plaintiffs and defendant respectively in a suit tried by the court without a jury in which plaintiffs, as licensed real estate brokers, claimed a commission of $143.75 for furnishing a would-be purchaser with whom defendant entered into a written contract to sell a certain lot and recovered judgment therefor.

The record presents no material question for review other than whether the judgment and finding of the court accord with the evidence, and no material question of fact in dispute except whether defendant agreed to pay plaintiffs a commission.

Against defendant's denial of an agreement to pay a commission is the testimony of plaintiff Strassheim and his clerk or agent, who began the negotiations, and the recognition in said written contract of the vendor's obligation to pay his broker a commission. On that point the weight of the evidence is with plaintiffs.

But the amount of the judgment is wrong. The material evidence is that defendant fixed his price at $3750 and agreed to pay a commission of 2½ per cent, thereon ($93.75); that plaintiffs drew the contract and in it

JOHN G. LUTTRELL,
Plaintiff in error,

vs.

[illegible] & CO.,
Defendants in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1931 I.A. 23

MR. JUSTICE ALBERT E. DILLENBERG DELIVERED THE OPINION OF THE COURT.

Defendants in error and plaintiff in error were plaintiff and defendant respectively in a suit tried by the court without a jury in which plaintiff, as licensed real estate broker, claimed a commission of $143.75 for furnishing a would-be purchaser with whom defendant entered into a written contract to sell a certain lot and recovered judgment therefor.

The record presents no material question for review other than whether the [illegible] and finding of the court accord with the evidence, and as material [illegible] fact in dispute except [illegible] plaintiff's entitlement to a commission.

Against defendant's denial of an agreement to pay a commission is the testimony of plaintiff Wasserheim and his clerk or agent, who began the negotiations, and the testimony in suit within contract of the vendor's attorney to pay the broker a commission. We have [illegible] the evidence in the [illegible].

[illegible] the amount of the judgment [illegible] material [illegible] defendant fixed his price at $1750 and agreed to pay a commission of 3% per cent thereon ($143.75); that plaintiffs drew the contract and in it

designated the purchase price as $3800 with a mutual understanding between plaintiffs and defendant that the excess of $50 was to go to plaintiffs though the purchaser supposed that $3600 was the actual purchase price. The contract provided for a deposit of $200 with plaintiffs as earnest money to be retained by defendant as liquidated damages in case the purchaser failed to perform, and if retained was to be applied first, to the payment of any expenses incurred for the vendor by his agent in said matter, and second to the payment of vendor's broker of a commission of $143.75 for services in procuring this contract, rendering the overplus to the vendor; Because of the failure of defendant to furnish an abstract in accordance with the terms of the contract the purchaser demanded of and received from plaintiffs the return of said earnest money.

So far as the record shows the earnest money was properly returned, and as we view it plaintiffs' apparent deception of the purchaser does not affect the question of defendant's liability.

It is plain that under such a state of facts plaintiffs were entitled to the $50 only in case the contract was consummated and the entire contract purchase price of $3800 was paid, or in case the $200 earnest money was retained as liquidated damages. The extent of defendant's agreement was that upon the happening of either of such events plaintiffs might deduct out of the money $50 for themselves in addition to their commission of $143.75. But neither event happening, defendant's liability was limited to his agreement to pay a commission of 2½ per cent on $3750.

As judgment should have been entered for the amount of said commission, viz. $93.75, the judgment below

designated the purchase price as $3600 with a mutual understanding between plaintiffs and defendants that the excess of the price to go to plaintiffs through the purchaser supposed that [illegible] the actual purchase price when the contract providing for a deposit of $[illegible] with plaintiffs in escrow money to be returned by defendant as liquidated damages in case the purchaser failed to perform, and it retained one to be applied first, to the payment of any expenses incurred for the vendor by his agent in this matter, and second to the payment of vendor's broker in a commission of $143.75 for services in procuring this contract, remitting the surplus to the vendor; and that because of the failure of defendant to furnish an abstract in accordance with the terms of the contract the purchaser demanded of the vendor from plaintiffs the return of said earnest money.

In the ex the record where the earnest money was [illegible] returned, and on the view it plaintiffs' contents description of the purchaser does not affect the question of defendants liability.

It is clear that under such a state of facts plaintiffs were entitled to the $80 only in case the contract and [illegible] the entire consider purchase price of [illegible] was paid, or in case the [illegible] was prevented or [illegible] by. The extent of defendant's agreement was that upon the happening of either of such events plaintiffs [illegible] and of the money [illegible] themselves in addition to their [illegible] of $[illegible]. But neither event happening, defendant's liability was limited to the agreement to pay a commission of $3 per cent or $[illegible].

In Palmer's [illegible] have been reversed for the [illegible] of said commission, viz. $[illegible], the judgment below

will be reversed and judgment will be entered here for that amount, each party paying his own costs.

REVERSED AND JUDGMENT ENTERED HERE FOR $93.75 FOR DEFENDANTS IN ERROR.

295 - 21278

ALFRED S. GREINER, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
PENNSYLVANIA COMPANY, Appellant.	)	COOK COUNTY.

198 I.A. 260

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $900 rendered for the plaintiff, Greiner, against the railroad company on a claim for damages to plaintiff's automobile resulting from a collision with defendant's train at a public crossing in the State of Indiana. The contention made is that the finding and judgment are against the weight of the evidence.

Plaintiff charged negligence generally in operating the train, and specifically (1) in disregarding his signal of danger and (2) in maintaining a crossing of inadequate width. The Court made a special finding against him on the last ground, and there was no evidence of neglect except such as tended to establish the specific charge of disregarding plaintiff's signal, and the finding of guilty must have rested thereon. The question presented for review, therefore, is the sufficiency of the evidence to support the conclusion that the train could have been stopped in time to prevent the collision after notice of danger given by plaintiff's warning.

The main facts in dispute bearing on this question are the distance of the train from the crossing when the notice or warning was given and the time when the train engineer applied the brakes. Defendant's train was a so-called fast train, running east on its south track at a rate

208 - 1978

ALFRED E. [illegible],
Appellee,

vs.

PENNSYLVANIA COMPANY,
Appellant.

CIRCUIT COURT.
DUPAGE COUNTY.

1907 A. 220

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for [illegible] rendered in the plaintiff's favor, [illegible] on a claim for damages to plaintiff's automobile resulting from a collision with defendant's train at a public crossing in the state of Indiana. The contention made is that the finding and judgment are against the weight of the evidence.

Plaintiff charged negligence generally in operating the train, and specifically (1) in disregarding his signal of danger and (2) in maintaining a crossing of inadequate width. The Court made a special finding against him on the last ground, and there was no evidence of negligence except such as tended to establish the specific charge of disregarding plaintiff's signal, and the finding of guilty must have rested thereon. The question presented for review, therefore, is the sufficiency of the evidence to support the conclusion that the train could have been stopped in time to prevent the collision after notice of danger given by plaintiff's warning.

The main facts in dispute bearing on this question are the distance of the train from the crossing when the notice or warning was given and the time when the train engineer applied the brakes. Defendant's train was a southbound fast train, running east on its south track at a rate

of speed, estimated at between 50 and 60 miles per hour. It was after dark in June. Plaintiff had crossed the tracks from the north and run his automobile a little off the crossing to the west, into a ditch on the south side of defendant's right of way. Being unable to move the car and noticing that its rear end extended over the south rail of the south track, he detached the "tail light" of the car, which gave a dim red light, ran westward on said track for the distance in dispute and waved the light to the approaching train. The engineer applied the emergency brake, stopping the train consisting of four Pullman cars and a combination car, with its rear at a point estimated at from 50 to 250 feet or more from the crossing. He could stop it in a distance of about 1000 feet.

About 400 feet west of the crossing was a semaphore, showing a white light, the signal for a clear, unobstructed course, and pursuant to the company's rules the engineer and fireman called the signal "white" to one another when they saw it. About 800 or 900 feet west of the crossing was the "whistling post" where the whistle was given for the crossing. Both the engineer and fireman testified that they did not see plaintiff until just before he stepped from in front of the train, which he said was when it was about 30 feet away; that they were then about 500 or 600 feet from the crossing. Plaintiff estimated the distance at 1200 feet, and one of his witnesses judged it was "in the neighborhood of 1000 feet or a quarter of a mile," and the other at "about a quarter of a mile" but admitted that he 'did not see how anybody could judge the distance at night to an accurate point.'

Where distances are not actually measured but merely estimated, it is a well known fact that individual

of speed, estimated at between 60 and 70 miles per hour. It was after dark in June. Plaintiff had crossed the tracks from the north and run his automobile a little off the crossing to the west, into a ditch on the right side of defendant's right of way. Going south in order to cross and noticing that its rear was extended over the south rail of the south track, he detected the "tail light" of the car, which gave a dim red light, was mounted on said train for the distance in dispute and marked the light to the approaching train. The engineer applied the emergency brake, stopping the train consisting of four railroad cars and a combination car, with its rear at a point estimated at from 50 to 250 feet or more from the crossing. He could stop it in a distance of about 1000 feet.

About 400 feet west of the crossing was a semaphore, showing a white light, the signal for a clear, unobstructed course, and pursuant to the company's rules the engineer and fireman called the signal "white" to one another when they saw it. About 50 or 60 feet east of the crossing was the "watching post" where the watchie was given for the crossing. Both the engineer and fireman testified that they did not see plaintiff until just before he stepped from in front of the train, which he said was when it was about 30 feet away; that they were then about 500 or 600 feet from the crossing. Plaintiff estimated the distance at 1000 feet, and one of his witnesses judged it was "in the neighborhood of 1000 feet or a quarter of a mile," and the white of "about a quarter of a mile" but admitted that he "did not see how anybody could judge the distance at night to an accurate point."

Where distances are not actually measured but merely estimated, it is a well known fact that individual

opinions greatly differ, depending on whether the judgment of the individual is good or bad, and without he is shown to be specially qualified from either nicety of judgment or special experience, there is no way in the absence of comparison with some physical objects or known data by which the superiority of the judgment of one witness of average intelligence over that of another can be determined. In the case at bar there was no way of determining the precise position of plaintiff when he waved his lamp. It was a pure guess at best. The very form of the testimony so indicates, and the very circumstances under which the estimates were formed rendered them more or less uncertain. Plaintiff was naturally concerned with impending consequences more than measurements at the time. He was under some excitement and running, as he said, one fifth as fast as the train and ran west of the semaphore, but did not deny he was east of the whistling post nor deny that the distance of the latter from the crossing was as testified to by the engineer. That post and the semaphore were the only two physical objects with which comparison was made. But their distance from the crossing was also estimated. Plaintiff said the semaphore, as he paced the distance, was under 500 feet from the crossing, and that he considered that he was more than that distance west of it; the fireman said it was about 400 feet. The engineer testified to the distance of the whistling post, and said it was about 800 or 900 feet west, and that it was passed before the train reached plaintiff. Plaintiff's witnesses had to judge of the distance by looking from the crossing which they had just reached before the accident. Owing to the darkness they could not see plaintiff, but saw only his light, as one of them testified. An estimate of distance formed under such

opinions greatly differ, depending on whether the judgment of the individual is good or bad, and without he is shown to be specially qualified from either nicety of judgment or special experience, there is no way in the absence of comparison with some physical objects or known data by which the accuracy of the judgment of our witness of average intelligence over such of another can be determined. In the case at bar there was no way of determining the precise position of plaintiff when he neared his lamp. It was a pure guess at best. The very form of the testimony so indicates, and the very circumstances under which the estimates were formed rendered them more or less uncertain. Plaintiff was naturally concerned with impending consequences more than measurements at the time. He was under some excitement and running, as he said, one fifth as fast as the train and ran west of the semaphore, but did not deny he was east of the whistling post nor deny that the distance of the latter from the crossing was as testified to by the engineer. That post and the semaphore were the only two physical objects with which comparison was made. But their distance from the crossing was also estimated. Plaintiff said the semaphore, as he passed the distance, was under 500 feet from the crossing, and that he considered that he was more than that distance west of it; the fireman said it was about 400 feet. The engineer testified to the distance of the whistling post, and said it was about 600 or 700 feet west, and that it was passed before the train reached plaintiff. Plaintiff's witnesses had no judge of the distance by looking from the crossing which they had just reached before the accident. Owing to the darkness they could not see plaintiff, but saw only his light, as one of them testified. An estimate of distance formed under such

circumstances with no fixed objects at definite distances with which to make comparison does not afford a sound basis upon which to base a verdict or finding when the burden of fixing the distance rests upon the party relying upon such estimate and when it is contradicted by equally credible evidence given by persons shown to be more familiar with the location and whose daily occupation requires them to exercise knowledge of distances.

It appeared that the train could be stopped in a distance of about 1000 feet, and we do not think that there was a preponderance of evidence that it ran more than that distance after defendant's servants had notice of the danger, nor that the brakes were not put on as soon as they received such notice. When we consider that it was dark, that the speed of the train was nearly a mile a minute, that the railroad signal was set for a clear way, that plaintiff's lamp gave but a dim light, which might well pass unobserved as defendant's servants in the exercise of duty were watching the important block and crossing signals under the engines strong headlight, and that the distances in question are mere estimates, a slight variation from which would change the entire ground for the charge of negligence (provided the brakes were promptly applied) we regard the finding and judgment contrary to the weight of the evidence.

While plaintiff's witnesses testified to circumstances tending to show that the brakes did not appear to be set until the time of the collision, we think the positive and circumstantial and corroborative evidence to the contrary is entitled to greater weight.

The record shows that defendant's counsel said he wanted to introduce in evidence an opinion of the Indiana Supreme Court and was given leave so to do, but

circumstances with no fixed objects at definite distances with which to make comparison does not afford a sound basis upon which to base a verdict or finding when the burden of fixing the distance rests upon the party relying upon such estimate and when it is contradicted by equally credible evidence given by persons shown to be more familiar with the location and those daily occupying requires them to exercise knowledge of distances.

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While plaintiff's witnesses testified to circumstances tending to show that the brakes did not stop of be put until the time of the collision, or that the position and strength signals and controlling evidence to the contrary is entitled to greater weight.

The trial judge that defendant's counsel was entitled to introduce in evidence an opinion of the Indiana Supreme Court and was given leave so to do, but

it does not affirmatively appear that defendant availed itself of the leave given and actually introduced the opinion. But if it had been introduced we do not think its omission from the record presents a case for indulging the presumption that the omitted evidence would support the judgment. It would really have presented a question of law rather than one of fact.

The judgment will be reversed with a finding of fact.

REVERSED.

It does not affirmatively appear that defendant availed itself of the leave given and actually introduced the opinion. But if it had been introduced we do not think its exclusion from the record presents a case for indulging the presumption that the omitted evidence would support the judgment. It would really have presented a question of law rather than one of fact.

The judgment will be reversed with a finding of fact.

ALTSCHUL.

295 - 21278

FINDING OF FACT.

We find that the appellant, Pennsylvania Company, was not guilty of the negligence charged in the declaration, and did not manage nor operate its locomotive engine and cars negligently and did not negligently disregard the signals of plaintiff as alleged in the declaration.

601 - 20939

LYDIA E. DEFREES, et al.,
Appellees,

vs.

ROBERT T. BRYDON,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

193 I.A. 279

MR. JUSTICE McCOORTY DELIVERED THE OPINION OF THE COURT.

This is an appeal of Robert T. Brydon, individually, from the decree of the Circuit Court of Cook County, entered August 12, 1914.

For the reasons stated in the opinion in case No. 20938, this day filed, the decree is reversed, and the cause remanded with directions to dismiss, (a) the bill, and amended and supplemental bill of complaint of Lydia E. Defrees, and (b) the respective cross bills of complaint of John F. Devine, as administrator of the estate of Frances E. Hill, deceased, and of John H. Kitchen, as administrator of the estate of Mary Bradley Kitchen, deceased, appellees, for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

474 - 20806.

THUNDERBOLT ADVERTISING COMPANY, a Corporation, Appellee, vs. W. F. HALLAM & CO., a Corporation, and W. F. HALLAM, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 280

MR. PRESIDING JUSTICE DAY delivered the opinion of the court.

This is an appeal from a judgment for $2,000.00 and costs entered by the Municipal Court of Chicago in a suit brought by appellee (plaintiff below) against appellants (defendants below), on a note for $2,000.00.

W. F. Hallam & Company, of which W. F. Hallam is president, is a Florida corporation engaged in the business of building, contracting, and in the sale of Florida lands. Some time prior to January 13, 1912, one B. J. Bussiere, president of the Classified Ad Company, an advertising corporation having its principal office in Chicago, Illinois, visited the said Hallam at Lakeland, Florida for the purpose of soliciting advertising for his company. In the negotiations between these two men it was represented that the Classified Ad Company was financially responsible; that if permitted to conduct an advertising campaign for the Hallam Company, the result would prove of great value to its business. In these discussions it appeared that the Hallam Company would not be able to pay in cash the amount of money required to conduct this campaign if entered into, and the plan of giving notes for part of this money was discussed, and in the course thereof it

was made known the Classified Ad Company would undertake to negotiate these notes through one Benjamin F. Page, of Chicago. As a result of these negotiations, a proposition for this advertising campaign was submitted to the Hallam Company by the Classified Ad Company, in a letter ~~under~~ dated January 19, 1912 addressed to W. F. Hallam & Company, Lakeland, Florida, signed by the Classified Ad Company, per R. J. Bussiere, president. The Hallam Company signified its acceptance thereto by stating on said letter that the proposition contained therein was fully and irrevocably accepted. This letter was submitted in person by Bussiere to the Hallam Company, and all the signatures affixed to said paper and the indorsements thereon were made at Lakeland, Florida on January 19, 1912. Said proposition provided that in consideration of the Hallam Company placing with the Classified Ad Company an advertising appropriation of $12,000.00, the Classified Ad Company agreed to furnish in a thorough businesslike competent manner, ~~contain~~ advertising in the best available and most valuable mediums. The Classified Ad Co. was to establish and maintain a well equipped correspondence office in Chicago to advance the interests of the Hallam Company in connection with the advertising campaign, and to place in charge thereof a competent correspondent as manager, the expense of which viz. $1,000.00 was to be paid by the Hallam Company. The Classified Ad Company was further to prepare the literature required for the successful prosecution of the advertising campaign and to supervise the publication of all such literature, the appropriation therefor ($2,000.00) also to be paid by the Hallam Company. The Classified Ad Company

further agreed to submit proofs of each piece of literature for final approval. The compensation to be received by the Classified Ad Company for its services in conducting this advertising campaign, to be a commission of 3½ per cent. of the gross receipts resulting from the advertising campaign, either directly or indirectly.

In a separate letter of the same date, the Classified Ad Company guaranteed that the Hallam Company would receive and do $150,000.00 worth of business as a result of the advertising appropriation of $12,000.00. It also guaranteed to supervise the literature expenditure of $2,000.00 and the Chicago office expenditure of $1,000.00. This guarantee provided that if the Hallam Company should fail to receive $150,000.00 worth of business within one year from the date of entering into the agreement aforesaid, the Classified Ad Company would refund 75 per cent. of the total charge for said service.

In accordance with the agreements entered into on this date, the Hallam Company gave to the Classified Ad Company in full payment of moneys needed in the campaign, including the expenditures, $6,000.00 in certificates of deposit, and $9,000.00 in the form of notes. The note sued on was one of these notes and was for the sum of $2,000.00, payable on October 19, 1912. This note, as well as other notes, was dated January 19,1912, payable to W. F. Hallam & Company, at the First National Bank of Lakeland, Florida, with interest from maturity at the rate of 10 per cent. per annum. They were signed by W. F. Hallam & Company per W. F. Hallam, and indorsed by W. F. Hallam & Company and by W. F. Hallam individually.

by F. W. Dalton & Company and by F. W. Dalton individually.

This note came into the possession of E. V. Gundlach about September 20 or 21, 1912. It was due October 19, 1912. Before its maturity it was taken over by the plaintiff company and Mr. Gundlach given credit therefor on the books of the company. It was not paid at maturity and thereupon suit was instituted against the Hallam Company and Mr. Hallam personally, by the plaintiff company, in which the judgment was entered from which this appeal has been prosecuted.

The statement of claim showed that it was a suit based upon a promissory note. Defendants, in their affidavit of merits, alleged:

"First, That the Gundlach Advertising Company has not bought and does not now own the note here sued on;

"Second, That the plaintiff at the time of the pretended assignment to it of the said note ~~here sued on~~ had notice ~~of the fact~~ that the consideration for said note had failed and that there were good and sufficient defenses to said note as between the Classified Ad Company and Benjamin B. Page on the one side, and these defendants on the other;

"Third, That at the time of the pretended purchase of the note ~~here sued on~~, the Gundlach Advertising Company and its officers and agents had such knowledge of the facts and circumstances surrounding the giving of this note and its want of consideration as to taint the entire transaction with fraud and to make the purchasing of said instrument by the Gundlach ~~Advertising~~ Company an act in bad faith;

"Fourth, That at the time of the pretended purchase of the note ~~here sued on~~ by the Gundlach ~~Advertising~~ Company, no payment was made thereon; and ~~the~~ before any payment was made thereon, if any payment was ever made ~~thereon~~, the Gundlach ~~Advertising~~ Company and its officers and agents had become aware of the defense claimed by these defendants and ~~of the fact~~ that the consideration for this note had failed, ~~and of the fact~~ that the note had been secured from these defendants by fraudulent practices, and had knowledge of such other facts and circumstances as to make the purchase of this note by the Gundlach ~~Advertising Company~~ amount to an act of bad faith."

On the trial ~~below~~ plaintiff, upon offering in evidence the note and testimony that it was unpaid, rested. The evidence on behalf of defendants ~~clearly~~ showed ~~that there has been~~ a breach of the covenants entered into by the Classified Ad Company in consideration of which the note in question, among others, was executed and delivered; that there had been a breach of faith in the negotiation of these notes on the part of the Classified Ad Company and that the title of the said Classified Ad Company to said instrument was defective. The burden, therefore, under sec. 59 of our Negotiable Instruments Act, R. S., ch. 98, was on the plaintiff to prove that it or some holder from whom it derived its title was a holder in due course. Under sec. 52 of the aforementioned act, a holder in due course is required to prove that the instrument sued on was complete and regular on its face, that it became the holder thereof before maturity, and without notice that it was previously dishonored, if such was the fact, that it took said note in good faith for value, and that at the time of its negotiation it had no notice of any infirmity or defect in the title of the person negotiating it. Whether or not plaintiff was a holder in due course or had derived its title from a holder in due course, was an issue of fact under the evidence for the determination of the jury.

~~On this issue~~ Evidence on behalf of the plaintiff ~~merely~~ tended to show that plaintiff, of which E. T. Gundlach was president, was a corporation doing a general advertising business in the city of Chicago; that the D.D.D. Company, of which ~~the said~~ Page was

president, had had considerable business dealings with the plaintiff Company; that Page and Gundlach had been friends for many years; that Page had become indebted to Gundlach personally to the extent of $14,000.00 or $16,000.00; that part of this indebtedness ~~was coming~~ came due on or about September 20; that some time in August Mr. Gundlach departed for a trip to South America to be gone indefinitely, and entrusted his personal affairs to J. W. Matteson, vice president of the plaintiff company, with power to attend to all his business during his absence, including the securing of payment from Page for the amount maturing in September. ~~It further appeared from the evidence that~~ About September 20, 1912, Page called upon Matteson and informed him that he was unable to pay Gundlach in cash, but tendered the note ~~here~~ used upon in payment ~~of~~ part of the indebtedness; ~~that~~ At the time this offer was made he exhibited a statement as to the financial condition of the Wallam Company ~~that~~ and Page also informed Matteson that if the note was not paid he would pay it himself; ~~that~~ The note was accepted by Matteson on behalf of Gundlach and credit given for the proceeds, viz., $1983.00, which represented the face of the note less six per cent. discount for the time it still had to run; ~~that~~ Shortly before it matured it was transferred by Matteson on behalf of Gundlach, to the plaintiff company, and Gundlach was given credit on the books of the company therefor.

On behalf of the plaintiff, both Gundlach and Matteson testified that they knew nothing of any transactions between the defendants herein and the Classified

Ad Company and Page, that they knew nothing of any contract ~~that had been entered into~~ between these people; ~~and further more,~~ that they had no knowledge of the failure on the part of the Classified Ad Company to perform the conditions in the agreement entered into with the defendants in consideration of which these notes had been executed. Upon cross-examination of these two witnesses and on direct examination ~~under sec. 41 of our Municipal Court Act, R. S., ch. 37,~~ defendants endeavored to prove their defense as set forth in their affidavit of merits. ~~A careful examination of the record discloses the fact that~~ Defendants appeared to have depended almost entirely for their defense on the evidence showing breach of faith on the part of the Classified Ad Company and Page, and the claim that plaintiff had not proven by a preponderance of the evidence the fact that it was itself a holder in due course or derived its title through a holder in due course who was not himself a party to any fraud or duress or illegality affecting the instrument.

~~Defendants, in due course of their argument, do not contend that the instrument was not complete or that it was illegal on its face, or that it did not come into possession of the plaintiff before it was due, but strongly urge that plaintiff has failed to prove that it received the note in good faith and for value, and that it received it without notice of any infirmity in the instrument, or that there was no defect in the title of the person negotiating it. There was testimony in the case~~ On the part of plaintiff, it was testified that Page was indebted in a sum considerably larger than the amount of the note in question; that at the time it was turned over to Gund-

lach part of this account was due and unpaid; ~~and the record further shows~~ that Patterson testified that he accepted said note in payment of part of the indebtedness due from Page to Gundlach. ~~Defendants, however, insist that this evidence does not establish that the~~ note was taken in good faith and for value, and without knowledge of any infirmity in the note, or any defect in the title of the person negotiating it. They argue that the note was not informed by Page; that there was no memorandum or record showing any credit given Page by Gundlach as a result of this transfer of the note, and furthermore, that Page guaranteed the payment of the note at maturity. They also comment upon the fact that Page and Gundlach were intimate friends and that the company of which Page was president had extensive business dealings with the plaintiff. But we regard these facts as elements for the jury to consider in arriving at a conclusion as to whether or not plaintiff was a holder in due course or had derived its title from a holder in due course. It cannot be successfully urged that these facts are sufficient to cause this court to hold as a matter of law that plaintiff had not proven his issue by a preponderance of the evidence.

Defendants particularly applied themselves to the contention that plaintiff had failed to show that it had taken the note for value, because there was no evidence of any credit given and there was no express agreement to show that it was taken as security for a pre-existing debt; that at best, the evidence merely showed that plaintiff took this note as collateral security and that such fact would not constitute plaintiff a purchaser for value; that fact rather showed that plaintiff was merely an agent of

Page to collect the note and apply the proceeds on the pre-existing debt. Defendants, in urging this contention, place great reliance on the rule of law announced in several New York decisions. The evidence shows that when these notes were given by the Hallam Company to the Classified Ad Company, it was intended that they should be negotiated, the proceeds, however, to be devoted to securing funds for carrying on the advertising campaign in question. Moreover, the evidence shows that defendants knew that the Classified Ad Company would negotiate these notes through Page. By their act they made it possible for Page to come in possession of these notes and negotiate same. While they expected that the proceeds thereof would be applied to the purpose intended, yet there was no evidence that plaintiff knew the purpose for which the notes were given or that it had knowledge of the breach of faith or the failure of the consideration for said notes, at the time Page negotiated the one in question. Under such facts and circumstances, the contention of the defendants, that in the absence of an express agreement that the note was taken as security for a debt, or a memorandum showing that credit was given Page for the amount, plaintiff failed to prove that it took the note for value and without notice, is without merit. While perhaps such contention may have been successfully urged under the New York decisions, yet our own courts have applied a different principle of law. This was first laid down in Manning v. McClure, 36 Ill. 490, where, under facts much similar to those in the case at bar, the court held, p. 499:

paid, p. 280.

"We are led, then, by what we consider the equities between the parties, and by the acknowledged policy of giving stability to negotiable paper, to hold that the indorsee of such paper, before its maturity, taking it as payment or security for a preexisting debt, and without any express agreement, shall be deemed a holder for a valuable consideration, in the ordinary course of trade, and shall hold it free from latent defenses on the part of the maker."

This rule of law was reaffirmed and adhered to in Mix v. National Bank, 91 Ill. 20, and Zollman v. Jackson Savings Bank, 238 Ill. 290.

The jury by their verdict determined the issue as to whether plaintiff was a holder in due course or received said note from a holder in due course, in favor of the plaintiff, and we cannot, after a careful review of the evidence, say that such verdict is clearly and manifestly against the weight of the evidence.

Defendants also complain that the court erred in its rulings on the admissibility of evidence offered on behalf of the defendants. It is true, the court, when Mr. Gundlach and Mr. Matteson were called as witnesses under section 33, supra, did sustain many objections to questions asked them by counsel for defendants. Technically, these rulings were correct because at that time defendants had not shown failure of consideration for the note or breach of faith in its negotiation. Later when defendants had introduced sufficient proof to cast upon the plaintiff the burden of showing that it was a holder in due course, defendants' counsel had the opportunity of again going into this matter on cross-examination of Mr. Gundlach and Mr. Matteson, both of whom were called as witnesses by plaintiff,

"In our law, then, by which we mainly
the equities between the parties, and by its
extraordinary power of giving stability to
impeachable power, is held that the instrument
of such power, before its execution, being in
no present or security for a pecuniary debt,
and without any express agreement, shall be
express a valid and valuable consideration,
in the ordinary meaning of words, and shall hold
it free from liens defeasance on the part of the
donor."

The rule of law was reaffirmed and adhered to
in **Ex parte Kimball Trust**, 27 N.Y. 53, and **Dallmann v. Gardner**
Brewing Co., 114 N.Y. 492.

> The jury by their verdict determined the issue
> as to whether plaintiff was a bona fide in the course of
> business with the firm a holder in good faith, in fact
> of the indebtedness, and the answer, in fact a verdict
> of the validity, and that such verdict is clearly and
> unmistakably against the weight of the evidence.

Defendants also contended that the mere actual
in the pledgee, on the substantiality of evidence offered
on behalf of the defendants. It is true, the court,
when Mr. Dallmann was Mr. Dallmann was called on to testify
under section 52, **supra**, his evidence was objectionable
quantities based upon by counsel for defendants. The judge
these objects were matters because of that fact from defendants
was not proven failure of consideration for the note or through
of fact in the negotiation. Large sums of money and in-
tendered sufficient proof to meet upon the identity the
burden of showing that it was a bona fide in the course,
defendants' contend that the evidence of legal taking place
this matter on correspondence of Mr. Dallmann and the
witnesses, both of whom were called on behalf of the plaintiff.

to show that it was a holder in due course? It remained for defendants to avail themselves of this opportunity.

Defendants also complained that the court did not correctly instruct the jury as to the law applicable to the facts and circumstances in evidence. The charge to the jury was an oral one. If it contained anything erroneous or objectionable or omitted anything essential, it was the duty of counsel for the defendants to bring the matter to the attention of the court. But the record is barren of any objection or suggestion with reference to the instructions given, and defendants cannot now complain of any error in the court's instructions to the jury.

Defendants finally complain of the closing remarks of counsel for plaintiff. They refer to two particular instances; in the one the court sustained objection thereto and in the other the court stated that counsel had the right to give his version of the evidence. While we agree that the remarks in both instances were improper and unwarranted, yet we cannot view these remarks as being so prejudicial as to have influenced the jury in arriving at their verdict.

Finding no reversible error, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

is plain that it was a matter in dur question. It remained for [illegible] to which [illegible] of this [illegible].

Defendants also complained that the court did not sufficiently instruct the jury as to the law applicable to the facts and circumstances in evidence. The course to be followed on that one. If it contained [illegible] or [illegible] or misleading [illegible], it was the duty of counsel for the defendants to bring the matter to the attention of the court. Not the remedy if matters of [illegible] or [illegible] also referred to [illegible] instructions given, and defendants cannot now complain if not [illegible] in the charge instructions to the jury.

Defendants finally complain of the [illegible] remarks of counsel for plaintiff. They refer to one [illegible] introduced in the case for [illegible] objection should not be [illegible] the court ruling that [illegible] the right of [illegible] of [illegible] "[illegible]" to argue that the remarks in both instances with [illegible] and [illegible], yet we cannot view these remarks as being so [illegible] as to deny defendants the fair [illegible] to which [illegible] of [illegible].

Finding no reversible error, the judgment of the [illegible] court of [illegible] will be affirmed.

AFFIRMED.

538 - 21041

WOLF, SAYER & MELLEN,
a Corporation,
Appellant,

vs.

F. R. TEGEN,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

STATEMENT OF THE CASE.- This is an appeal from an order entered September 4, 1914 dismissing appellant's cause of action on motion of appellee.

~~Mr. PRESIDING JUSTICE FARM~~ delivered the opinion of the court:

On July 11, 1913 a writ of replevin was served on ~~appellee~~ F. R. Tegen, defendant, who, on July 17 entered his appearance. On September 4, 1914, upon motion of ~~appellee~~ and notice thereof, the court dismissed the suit and ordered a return of the property taken under the aforementioned writ.

The record before ~~this~~ the appellate court ~~[illegible]~~ (certified to be complete) consists of: ~~the following:~~ the affidavit for replevin, the writ of replevin, the replevin bond, the appearance of the defendant, the motion to dismiss the cause, and the order of dismissal. Although the cause was pending for more than a year at the time it was dismissed, no declaration was ever filed. The record ~~in the case at bar~~ contains no bill of exceptions, stenographic report or statement of facts; ~~in fact, there is nothing in the record to indicate why the cause of action was dismissed on appellee's motion. Therefore, we must presume that the action of the court in dismissing the cause of action was proper. Accordingly the order of the Circuit Court of Cook County must be affirmed. The motion of appellee for the assessment of statutory damages is denied.~~

AFFIRMED.

2/2/2

233 - 21112.

LOUIS A. LENCKI,
Defendant in Error,

vs.

JOHN SCHULTZ and
MARY SCHULTZ,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 294

STATEMENT OF THE CASE.- This is an action of forcible entry and detainer brought by defendant in error (plaintiff below) against plaintiffs in error (defendants below,) under clause 5 of section 2 of the Forcible Entry & Detainer Act, R. S., chap. 57, which provides that such action may be brought "when lands or tenements have been conveyed by any grantor in possession * * * and the grantor in possession * * * refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent." Upon the trial below, the jury under instructions from the court, found the defendants guilty of unlawfully withholding possession of the premises described in plaintiff's complaint and that the right to the possession of said premises was in the plaintiff. Upon this verdict the court entered the judgment to reverse which defendants have prosecuted this writ of error.

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

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~~The evidence on behalf of the plaintiff showed~~ Plaintiff's evidence that defendants were in possession of the premises in question at the time of the demand for possession and the bringing of the action; that ~~the said~~ defendant John Schultz, was on the

property at the time of the execution of the deed conveying same. There was also introduced in evidence a quitclaim deed from John Schultz and Mary Schultz, his wife (defendants) to the plaintiff, and the demand for possession served by plaintiff upon the defendants.

On behalf of the defendants there was an offer to show that at the time this quitclaim deed was given to the plaintiff, the defendants were threatened with a personal injury suit; that this conveyance was made at the suggestion of plaintiff, who said he could settle the case for little money; that he would hold the property as security for moneys advanced in settlement and not place the deed of record; that the property was to be deeded back when the personal injury suit had been disposed of and the plaintiff reimbursed for advances made, if any; that the deed was given with the understanding that it should not in any way disturb the possession of defendants; that nothing was ever paid by Lenoki; that when defendants demanded the deed back, plaintiff discharged John Schultz from his employ and started an action in forcible detainer. After this offer was made counsel for defendants stated: "I offer to show by the witness that in fact the title to the property in question is involved in this suit, and ask to have the court pass upon that issue." This offer was rejected and exception taken thereto. There was also an offer to show that in the former action of forcible entry and detainer plaintiff had testified that John Schultz was to remain in possession as a tenant of the plaintiff, which offer was also refused. In making this offer, defendants contended that the relationship of landlord and tenant did not exist.

Before the close of the case plaintiff offered in evidence a decree entered in the Circuit Court of Cook County in the case of Mary Schultz, one of the defendants herein, against plaintiff and John Schultz, the other defendant, to set aside the deed (which was the deed offered in evidence in the case at bar) given by her husband and herself to the plaintiff; he also offered in evidence the bill of complainant and his (Lenchin's) answer thereto. That suit was based upon practically the same facts as defendants offered to prove as matters of defense in the action at bar. Objection was made on behalf of John Schultz, on the ground that he was not a party to the action. It appeared, however, that he attended as a witness for the complainant in that action.

On this state of the record, defendants contend that the court erred in directing a verdict for the plaintiff. They first contend that the court erred in excluding the evidence offered on behalf of defendants for the reason that said evidence would have shown that the deed upon which plaintiff based his title was in fact a mortgage and that it was intended merely as security for the payment of a debt to be incurred by reason of making advances for defendants, and that such a deed in law and in equity is regarded as a mortgage, and that upon such a conveyance a forcible detainer action cannot be maintained by the grantee. Defendants, in support of their contention, cite West v. Frederick, [illegible] Ill. 101, and Aurner v. Tierney, 103 Ill. App. 208, which were cases brought under the same section of the Forcible Entry & Detainer Act as the case at bar. In the former case cited it was admitted on behalf of the plaintiff that the deed was taken merely

as security for an indebtedness, and that plaintiff had agreed to reconvey the property upon repayment of the loan. In the case of Aurner v. Pierce, supra, it appeared from the evidence that the property had been conveyed to plaintiff merely as security for a loan, and furthermore, that the deed conveying the property was not from a grantor in possession. Therefore, these cases are not at all applicable to the facts in the case at bar. Moreover, counsel admitted that this offer of evidence was for the purpose of putting in issue the title of plaintiff, and further, that in an action of forcible entry and detainer the title of the plaintiff is not triable. By these admissions defendants practically concede the correctness of the judgment for the plaintiff.

The law under which this action was brought, is plain, that if plaintiff shows he has a deed from the grantor in possession and has made a demand for possession, followed by a refusal and continuance in possession, the action will lie. Peters v. Balke, 170 Ill. 304. In such action the question of title between plaintiff and defendant or anyone else cannot be tried, and the right to possession in the plaintiff is not dependent upon his title but upon the existence of particular facts specified in clause 6, section 2 of our Forcible Entry & Detainer Act, supra. Peters v. Balke, supra; Fietsch v. Fietsch, 152 Ill. App. 306. These facts did appear in the case at bar, viz.; a quitclaim deed to the plaintiff from the grantor, and a continuance in possession by the grantor after a written demand for possession. The evidence offered

on account of the [illegible], and that plaintiff has agreed to remedy the defective [illegible] of the boat. In the case of **Gaston X. Cayzer, Admr.**, [illegible] it appeared that the defendants had [illegible] and [illegible] to plaintiff merely an account for a [illegible], and [illegible], that the boat [illegible] the priority, [illegible] not [illegible] a priority in [illegible]. Therefore, these [illegible] are not at all applicable to the facts in the case at bar. However, numerous authorities [illegible] of evidence was for the purpose of proving in [illegible] liability of plaintiff, and further, that in an action of [illegible] and weighing the claim of the plaintiff in [illegible]. By these authorities [illegible] fully discuss the sufficiency of the judgment for the plaintiff.

The law under which this action was brought, is clear, that if plaintiff comes or has a claim from the greater to [illegible] and can show a [illegible] for [illegible] [illegible] by a [illegible] and [illegible] [illegible], the action will lie. **Gaston X. Cayzer**, 171 Ill. App. 3d. [illegible] with the question of right between plaintiff and defendant or anyone else cannot be tried, and the right to [illegible] in the plaintiff is not dependent upon the right but upon the relationship of particular facts [illegible] in clause 6, section 2 of our Portable Tank, [illegible] act, supra. **Gaston X. Cayzer, Admr. Gaston Cayzer v. Plaintiff**, 171 Ill. App. 3d. These facts did appear in the case at bar, viz.; a qualified fact in the plaintiff from the grounds, and a stipulation in [illegible] by the [illegible] also a written [illegible] for [illegible]. The [illegible] of

on behalf of the defendants was not competent, because thereby it was sought to put in issue the title of the plaintiff and not the facts proven by the plaintiff. While defendants further contend that the court erred in admitting the deed in evidence, yet in Peters v. Balke, supra, the court expressly held that the introduction of a deed was necessary in connection with the fact of possession, to show that there was a grantor who conveyed and a grantee to whom the conveyance was made.

Defendants further complain that the court improperly admitted in evidence the bill and answer and the decree in the case of Mary Schultz against the plaintiff, heretofore referred to. There was no objection made to this evidence on behalf of the defendant, Mary Schultz, and when it is considered that the other defendant, John Schultz, on whose behalf the objection was made, was a witness in the chancery proceeding on behalf of the complainant, the court did not err in the admission of this evidence. At best, this evidence was only cumulative, and inasmuch as the court in this case instructed the jury to find for the plaintiff, its admission cannot be considered harmful to the defendants.

Defendants finally contend that the courterred in rejecting the offer of evidence on behalf of the defendants that plaintiff had testified in a previous trial in forcible entry and detainer that defendant, John Schultz, was a tenant. In Evans v. Evans, 163 Ill. App. 203, the court held that where a tenant in an action for possession by the landlord asserts an adverse right and denies the relationship of landlord and tenant, he is estopped from afterwards claim-

on behalf of the defendants was not important, because
strictly it was enough to rely on keeping the title of the
plaintiff was not their person by the plaintiff.
Major Atkinson further argued that the court erred in
admitting the deed in evidence, yet in Ellis v. Lane, the
law court expressly held that the introduction of a deed
was necessary in support of the fact of possession,
to show that there was a grantee who accepted the
grantor, in whom the conveyance was made.

In Demarest further argument that the court has
improperly admitted in evidence the will and deed of the
defendant in the case of Mary Demarest against the plaintiff,
particularly referred to. Their was no objection made to
this evidence on behalf of the defendant, they insisted,
and there is no contention that it was incompetent, that
insists, on their behalf the objection was made, was a
question in the property possession on behalf of the com-
plainant, the court did not err in the admission of this
evidence. In fact, this evidence was only cumulative, and
immaterial as the court in this case instructed the jury
to find for the plaintiff, its admission cannot be complain-
ed of in the defendants.

Defendants finally argued that the counterclaim in
relating the error of evidence on behalf of the defendants
that plaintiff had trespass in a previous trial in driving
away and detained that defendant. The Judgment, was a bar
to Ellis v. Lane, 24 N.J. Eq. 478, the court held that
where a lessee in an action for possession by the landlord
asserts an adverse right and denies the relationship of
landlord and tenant, he is necessary two alternative claims

ing that such relationship exists, and the court therefore properly rejected testimony by which it was sought to show such relationship.

Finding no reversible error, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

Gilbert

216 - 21300

MARGARET RUEHE,
Appellee,

vs.

HENRY C. RUEHE,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

198 I.A. 298

STATEMENT OF THE CASE.- This is an appeal from an order entered in the Superior Court of Cook County, on January 18, 1915, committing defendant (appellant) to the Cook County jail until he shall have complied with an order of said court for the payment of temporary alimony, amounting to $45, and the additional sum of $33.50, charges of the master in chancery in determining whether or not the defendant was guilty of contempt, or until he be released by due process of law, not to exceed the period of six months.

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On December 21, 1914 a rule was entered upon Henry C. Ruehe, defendant, to show cause why attachment should not issue for his failure to pay temporary alimony during the preceding five weeks. Defendant filed a sworn answer wherein he stated that he had no money with which to pay the alimony to the complainant (appellee), and set forth in detail his income, expenditures and liabilities; also that he was taken sick on November 21, and since December 2 had been confined to his bed, and that for a great part of the time he was under the care of a physician, his ailment being ulcer of the stomach. Attached thereto was an affidavit of his physician under date of December 21, stating that since December 2 defendant had been under his care; that he

was suffering from ulcer of the stomach and was unable to work.

~~On January 12, 1915~~ the matter was referred to a master in chancery to determine whether defendant was in contempt of court for failure to pay all or any part of the alimony due under the order of the court theretofore entered, the master to make his report within 48 hours. On January 14 the master filed his report, wherein he made certain findings from which he concluded that defendant was in contempt of court, and recommended that defendant be committed until he shall properly comply with the rule in relation thereto. Said report contained the testimony taken before him on the reference. On ~~the 14th day of~~ January 15 the master submitted a supplemental report wherein it was stated that the objections filed to said report by defendant were duly argued and overruled, and wherein he further certified that a stenographer was necessarily employed to transcribe the testimony; that a copy of such testimony certified by the master and attached to his report was made by the stenographer; that a reasonable fee for such stenographic services was $13.50, and that said master's fee therein was $25.00, making a total of $38.50. It was ordered that defendant's objections filed thereto stand as exceptions. On January 18 the court approved the master's report and found that defendant was able to pay the alimony due under the order theretofore entered, and that defendant wilfully refused to pay said alimony; that there remained due and unpaid to the complainant the sum of $45.00 as alimony on the order theretofore entered by the court; allowed and approved the

was multiplying from month of the element and was unable to note.

On January 14, 1944 the author was relieved of a number in monthly an observing an observation shortly indicated was in authority of using for failure to pay all or any part of the minimum that under the order of the court therefore enjoined, the month of June his report within an hours. In January 24 the author filed his report, wherein he made certain findings from which he concluded that defendant was in authority of court, and recommended that defendant be committed until he shall properly comply with the date in violation thereof. Last report contained the testimony taken before him on the reference. On the same day the court entered a supplemental report herein wherein it was stated that the objections filed to said report by defendant were duly argued and overruled, and therein he further certified that a stenographer was necessarily employed to transcribe the testimony that a copy of such testimony certified by the author was attached to the report. The author was asked by the stenographer that a transcript for the far such stenographic portion was $13.50, and that fees was made by the stenographer; that a reasonable and customary fee therefor was $50.00, making a total of $63.50. It was argued that plaintiff's objections filed there to exact no exceptions. In answer to the court stated the author's report and found that defendant was guilty of the charges the court therefore directed to pay the stenographer the sum of $63.50 and that defendant willfully refused to pay said sum, and that defendant willfully refused to pay said sum, and that defendant be and remain in the county jail of said county until he shall purge himself of said contempt by paying said sum.

Plaintiff then on of $63.50 be allowed on the court jurisdiction; that there therefore and remain in the county jail of said county until he shall purge himself of said contempt by paying said sum.

master's charge of $38.50 and ordered that defendant "be committed to the County Jail of this County, until he shall have complied with said order of this Court, and shall have paid all of said amount of Forty-five ($45.00) Dollars, as alimony due, and the additional sum of Thirty-eight and 50/100 ($38.50) Dollars, as Master's charges, or until released by due process, not to exceed the period of six months however."

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Defendant contends that under the evidence taken by the master and under the affidavit filed by the defendant, the court was not warranted in finding that the defendant was able to pay the alimony due under the order theretofore entered; and further, that even though defendant was in contempt for his failure to comply therewith, the court was without authority to include in said order the item of $38.50 master's charges.

There is no question that defendant was in default with respect to the payment of alimony. Whether or not defendant was able to pay such alimony, presented a clear issue of fact. This issue the court referred to the master, whose report shows that he was attended by counsel for both parties and that testimony was heard on behalf of both parties and that an affidavit of defendant himself, accompanied by exhibits, was presented to the master. While the master expressed some doubt as to his right to receive affidavits under the order of reference, he, however, resolved that doubt in favor of the defendant. The master's report found that the amount of alimony due was $45.00, and

master's charge of £28,[illegible] was undoubtedly that defendant. The committee in the County Jail of this County, until he should have complied with this order if this Court, can finally have paid all of said amount of Twenty-five (25.00) Dollars, be allowed due, and the additional sum of Thirty-eight and 80/[illegible] (38.80) Dollars, in Master's charge, or until released by the process, but to expend the period of six months however."

XI. Possibility of error and injustice in relation of the order.

Defendant contends that under the evidence taken by the master and under the affidavit filed by the defendant, the order of the commissioner in Florida that he should be able to pay the alimony for under the order therein entered, and further, that even though defendant was in contempt for failure to comply the order, the judge had without authority to imprison in such order the item of £28.80 master's charges.

There is no question that defendant was in contempt with respect to the payment of alimony. Whether or not defendant was able to pay such alimony, presented a mixed issue of fact. This leaves the court referred to the master, where fairly stated that he was attended by counsel for both parties and that testimony was taken on behalf of both parties and that an affidavit of defendant himself, accompanied by exhibits, was presented to the master. Inside the matter mentioned even large as to the fact is trying affirmative under the rules of reference, in, therefore, the answer that there is fact of the defendant. The master's report found that the amount of alimony due was 38%, and

that defendant was able to pay same. It also set forth certain other findings, from all of which the master concluded that defendant was in contempt of court, and recommended that he be committed until he should properly comply with the rule in relation thereto. This report was approved by the court, and the only question is whether or not the master was warranted in arriving at his findings and conclusions. Unless we are of the opinion that said findings and conclusions of the master, concurred in and by the chancellor, are clearly and manifestly against the weight of the evidence, they must be affirmed. This we are unable to say.

Defendant also complains that the court erred in including in the amount due from the defendant, the master's charges. He insists that "the court has no authority to enforce the payment of costs awarded in a chancery suit in any other manner than by execution, and that payment of such costs cannot be enforced by punishment as for a contempt of court." In this case, however, the master's charges were not the ordinary costs in a chancery suit. They were incurred by reason of defendant's failure to comply with a previous order of the court, which led to the contempt proceedings. Defendant himself was responsible for these costs, and our courts have always been upheld in assessing the costs of a contempt proceeding against the defendant if found guilty, the payment of which was a condition precedent to a discharge from any order of commitment entered because of the contempt. People v. Diedrich, 141 Ill. 665; Hake v. People, 230 Ill. 174.

Finding no reversible error, the order of the Superior Court of Cook County will be affirmed.

AFFIRMED.

that defendant was guilty of any fault. It also set forth another ground for finding, from all of which the jurisprudence concluded that Defendant was in default of liability, but recommended that he be condemned until he should indemnify by compelling with the rule in relation thereto. This report was approved by the court, and the only question is whether or not his remedy was exhausted in proceeding on his finding and conclusion. Taken as one of the opinion that such findings and conclusions of the master, approved as and by the Chancellor, are clearly not conclusive against the right of the evidence, they must be affirmed. This we are unable to say.

Defendant also complains that the trial court is insisting in the amount that from the difference, the master's charge. He insists that this court has no authority to adopt the payment of being accepted in a discovery suit in any other manner than by stipulation, and that payment of such sums cannot be enforced by punishment as for a "sum basis of money." In this case, however, the master's charge was made not the ordinary order in a chancery suit. They were inserted by reason of defendant's failure to comply with a previous order of the court, which led to the somewhat necessitage. Defendant himself was responsible for the delay, and a court cannot always been upheld in enforcing the order of a contempt proceeding against the defendant if from guilty, the payment of which was a condition precedent to a discharge from any order of commitment entered because of the contempt. Ferrin v. Dickinson, 144 Ill. 649; Ohio v. Ferrell, 290 Ill. 374.

Finding no reversible error, the order of the Chancellor court of this County will be affirmed.

1277

[illegible] v. [illegible]

[illegible],
appellee,

vs.

[illegible] & [illegible],
a corporation,
appellant.

APPEAL FROM
[illegible] COUNTY.
[illegible] DIVISION.

198 I.A. 306

MR. JUSTICE [illegible] delivered the opinion of the court.

This appeal was taken to reverse a judgment of the Circuit Court obtained by the appellee, hereinafter referred to as plaintiff, against the appellant, hereinafter referred to as defendant, for $7500, for damages resulting from plaintiff's fall from one of defendant's freight elevators, due, it was claimed, to negligence on the part of the defendant. It appears the latter accident happened May 18, 1911, while the plaintiff was trucking a load of empty boxes in the packing department of the defendant's packing house. The plaintiff, a Lithuanian, had, at the time of the accident, been in this country about a year and had been employed in defendant's packing department as a common laborer, trucking heavy boxes for about six or seven months. There was a dispute in the evidence as to whether the plaintiff had ever, before the time of the accident, trucked empty boxes. His own testimony [illegible] that he never had, and this is corroborated in some degree by the fact that the work of trucking loaded boxes was new to him, while empty boxes were trucked by boys, except for a period of a week or two, when men were used in this work, in some extent at least. This is further corroborated to some extent by the testimony of defendant's witness Slabber. He testified that he had never seen plaintiff trucking empties except full boxes. Although, as defendant's counsel point out, [illegible] plaintiff worked.

[illegible] plaintiff's witness [illegible] that he trucked empty boxes at times, and that Dunczewski did the same thing. A careful examination of the records showed, finally, that the question: "Did Dunczewski did the same kind of work and trucked the same kind of boxes, didn't you 'hel' while you were there?" to which the witness answered "Yes." [illegible] legally refers to the recording of oral testimony referred to in the text by "Preceding questions and answers."

Defendant's witness Wright and Thomas testified that they sometimes saw plaintiff trucking empty boxes, without stating how long; Tally said sometimes twice a week. Further, a boy engaged in trucking empty boxes, said, "Oh, we brought (empty boxes) about two or three times a week, and then the other time we brought full boxes." Swiatkowski, the elevator operator, said that plaintiff was trucking sometimes full, sometimes empty boxes. Sullivan, the assistant foreman, said that plaintiff had been working in the department about three to five months; that he saw him trucking empty boxes maybe twice a week, maybe six times a week, maybe once a week; that boys trucked empty boxes, but they were short of boys for a couple of months, and had to supply truckers trucking full boxes in truck empty boxes. Plaintiff was, at the time of the accident, 5 feet 9½ inches, weighed about 170 to 177 pounds, and was 1 foot 7 inches in height.

On the day of the accident in question, while plaintiff was trucking loaded boxes, as usual, he was ordered to put down his truck and to help one of the trucks need for empty boxes. The trucks used for full boxes were ordinary hand trucks, with two wheels in front and handles, with a hook at the end over the wheels drawn to two and one-half feet high. The trucks used for

trucking empty boxes were similar, except that their backs were between four and four and one-half feet high. The floors of these trucks were thirteen inches above the ground, making the top of the back of the trucks from five feet one inch to five feet seven inches high. Then plaintiff had taken the empty truck as directed, and apparently had put upon it what he considered a load, a foreman by the name of Frank Sullivan said, "Can you only put as many boxes on your truck?" Then Sullivan, according to plaintiff's testimony, put hold of the boxes and put them on lengthwise and crosswise until they were as high as the top of the fingers of his hand when his arm was stretched out full height. Then Sullivan told him to take it from one room to another, and he took the truck from the platform to the elevator. Sullivan denies that he put the boxes on the truck, or said anything of the kind. The plaintiff testified also that the boxes were piled out on the handles of the truck until they came within five inches of the ends of the handles. Plaintiff then turned his back to the truck, took hold of the handles, backed it on one of the elevators of the canning department, and then turned around, facing his load. The elevator itself was a platform elevator, five feet eight inches wide, and seven feet five inches long, and was open at both ends; the truck was five feet four and one-half inches long; consequently, when a truck was placed in the exact center of the elevator there would be a margin of substantially a foot between each end and the edge of the elevator. There was a clearance between the elevator and the floor of three-quarters of an inch. The elevator itself was operated by a man stationed in a little shanty on the fifth floor at the top of the elevator shaft. The ten-

timony of the plaintiff is that he went for the elevator, and as soon as it reached the second floor, loaded his truck aboard, turned around, and the elevator went right up. Defendant contends that plaintiff's testimony was to the effect that he waited for the elevator to start after he got aboard, but this is not borne out by the record. The abstract does quote the plaintiff as saying, "I turned around facing the boxes waiting for the elevator to start, and the elevator went right up." While this correctly abstracts the answer given to one question, a careful examination of the record shows that plaintiff repeatedly stated that as soon as he turned around facing the boxes, the elevator went up right away. Likewise, the statement that before the elevator started up, "I was on long enough to see that the truck was all right, and I turned around facing the boxes," shows that this refers to the time that he was arranging the truck with reference to the rear of the elevator, and while he had hold of the handles, with his back to the load. It does not contradict his repeated statement that as soon as he turned around facing the load, the elevator went right up. There is a conflict in the evidence as to whether plaintiff gave the elevator operator any signal to start. He had rung the bell for the elevator, and he testifies that when he turned around facing the load, the elevator went right up without any signal from him, and that no signal was necessary because the operator knew that empty boxes went to the third floor. While the operator testified that he did know that empty boxes went to the third floor, he testifies that plaintiff gave him a signal to start.

The testimony of both sides shows that the bodies

of the truck used in trucking empty cases varied away from the bottom of the truck, so that instead of being directly perpendicular, the load of the truck slanted out toward the edge of the platform not more than four or five inches, according to defendant's witnesses; more than that, according to plaintiff's. The effect of this slant was, of course, to reduce the clearance between the ends of the truck and the shaft of the elevator; in other words, to reduce the margin of safety, and also to assume the top of the load to extend beyond the edge of the elevator platform, even when the wheels and the bottom of the truck might be entirely upon the platform in a position to clear.

While the elevator was passing from the second to the third floor, the top of the load struck against a beam or joist which came flush with and supported the third floor. And the load not projected to such extent more than three-quarters of an inch beyond the edge of the elevator, it would have passed in safety; when it struck the beam, the beams were knocked off against plaintiff, causing him to fall from the elevator to the bottom of the shaft, a distance of about 70 feet.

Plaintiff's declaration consisted of four original and five additional counts. The court instructed the jury to find for the defendant on all except the first original, and the first and second additional counts.

Defendant first contends that there was no evidence to sustain the charge of negligence made in the first count of the original declaration. This count charged, in substance, a failure to construct walls or other protection or enclosure around the space occupied by the elevator. We say, as a matter of law, that there was no evidence fairly tending to sustain this

charge[illegible] [illegible] an elevator, [illegible] at both ends, paid by boys and furniture [illegible] in elevating from one floor to another truck which was loaded thereon had a very narrow margin and with boxes sticking out at an angle from the back toward the edge of the platform, and piled as high, in this instance at least, that the trucker could not see over the top. In this connection the defendant says that the plaintiff has failed to offer any affirmative proof that it was usual or customary or practicable to construct walls or other protection around the space occupied by the elevator. In our opinion, however, it was sufficient for the plaintiff to show the physical conditions existing, and all the facts and circumstances surrounding the operation of the elevator, and leave the question of the practicability of protecting the elevator to the jury. It was not necessary, and we doubt whether it would have been proper in this case at least, to submit to the jury plans and specifications showing how elevators might or could have been protected. All the material facts and circumstances were shown, and it was, in our opinion, the proper province of the jury to say whether, in view of these facts and circumstances, the failure to provide the elevator with walls or other protection or safeguards constituted negligence on the part of the defendant, and an affirmative conclusion in that regard could not be said to be in any way manifestly contrary to the weight of the evidence. Moreover, counsel for defendant apparently claimed that the question of ordinary care in the matter of construction of this kind depends upon what is usual. It is obvious, of course, that what is usually done cannot be the standard by which the question of negligence is to be determined. It is, of course, conceivable that what is usually done in any

given particular way by [illegible] in the [illegible] to a negligent disregard of the safety of others; so, if the rule contended for were followed, no action could ever be had for conduct, no matter how culpably negligent, if it were usual generally. Progress in the protection of life and limb has been made largely by disregarding the question of what might have been customary, and considering whether, under all the circumstances of the case, danger to life and limb was foreseeable to a person of ordinary prudence and caution. In passing on this point in Seidler v. Lundgren, [illegible] Ill. 499, our Supreme Court said, at page 499:

> "Some expert evidence was introduced to show that such construction was usual in the city of Chicago. The question to be determined was whether or not the shaft was properly constructed and whether Lundgren negligent in maintaining it in that condition, and not how elevators were usually constructed in the city of Chicago. Chicago, Rock Island and Pacific Railway Co. v. Lynch, [illegible] Ill. [illegible], upon which the evidence fairly tended to prove the charge of negligence contained in the declaration."

At this point it may be said that if there is evidence sufficient to sustain the action laid in any one of the three counts, the refusal to give peremptory instructions with reference to the other two, even if erroneous, could not in law be the ground of a reversal. (Chicago City Railway v. Carroll, [illegible] Ill. [illegible]; Gaff v. Lundgren, [illegible] Ill. 480.)

Defendant next contends that the second additional count should have been taken from the jury, "First, because there was absolutely no evidence tending in the slightest degree to show that the elevator operator was negligent, and second, because in any event the elevator operator

and plaintiff were fellow servants." The answer to this is two-fold: First, it is sufficient if there was evidence to sustain one count in the declaration, and second, the court erroneously instructed the jury that the plaintiff and the elevator operator were fellow servants, and that no recovery could be had on account of the negligence, if any, of the latter. In view of the positive and peremptory character of this instruction it was of no importance that the court failed to give a formal instruction to find the defendant not guilty in a count where the negligence of said operator was charged.

Defendant also contends that there was no evidence upon which the three additional counts could properly have been submitted to the jury. This count, after setting out matters of inducement, and that the plaintiff was a common laborer whose duty it was to transport boxes from the loading platform adjacent to the packing house, into the packing house, and on an elevator by means of a hand-truck, charges that it was the duty of the defendant to furnish plaintiff with a reasonably safe place to work; that the defendant did not render the duty, but ordered and commanded the plaintiff to put an unusually large number of boxes on the truck; that he did so ordered; that he was unable to see over the top of them; that he was ordered and commanded to convey the truck by means of said elevator to the upper floor of said packing house; that in obedience to such command the plaintiff did then and there convey the truck from the loading platform with all due care and caution for his own safety; that by reason of the height of the boxes, he was unable accurately to observe the position of the truck, and thereby the place where plaintiff was required to stand, while being moved upwards, between roofs, which fact was well known to the

defendant, but not to the plaintiff. We think there was ample evidence to justify the court in submitting the issues raised by this count to the jury. There was evidence tending to show that the number of boxes piled on the truck was, as to the plaintiff at least, unusual; that they were so high that he could not see over them and judge the exact location of the truck, and consequently the question of whether these facts, in combination with all the other facts in evidence, rendered the place unsafe, and whether that fact was known or should have been known to the defendant, were properly questions of fact for the jury's determination, and were properly submitted to it.

Defendant's counsel next contend that plaintiff assumed the risk of the danger which resulted in this accident, as a matter of law. In Greene v. Illinois Central Gauge & Co., 161 Ill. 486, our supreme Court has said that,

> "The servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent, and if he voluntarily enters into or continues in the service, knowing, or having the means of knowing, its dangers, he is deemed to have assumed the risks and to have waived all claims against the master for damages in case of personal injury."

Defendant's counsel point out the length of time plaintiff had been employed in this work and the frequency with which he had used the elevator, and conclude that the dangers, if any, and the specific hazard which caused the accident, were as open and apparent "as was the physical situation," and therefore plaintiff assumed the risk, and cannot recover.

The law is that, while ordinarily, of course, the question of whether the servant has assumed the danger which he encounters, or has been guilty of contributory negligence, is one of fact, yet, as in other cases, the question will become one of law when but one conclusion can be drawn from the evidence by all reasonable minds. (Greene v. Illinois Central Gauge & Co., supra.)

The question, then, is: can we say that the only conclusion which can be drawn from the evidence by all reasonable minds is that the specific hazard which caused the accident was open and apparent? The accident obviously happened because the load extended beyond the edge of the platform. Are we able to say, as a matter of law, that this hazard was open and apparent to the plaintiff? The fact that the jury must be taken to have found, by its verdict, that the danger was known, or by the exercise of reasonable care would have been known, to the defendant, does not necessarily compel the conclusion that it must also have been known to the plaintiff. The evidence shows that the defendant was a corporation engaged in the making business, having the plant in question and other plants in connection therewith, and its their operation employed foremen, superintendents, and architects, and was possessed of their knowledge and through that knowledge must have been fully aware of the construction and capacities of the plant and facilities and the danger, if any, incident thereto. Plaintiff, on the other hand, was a foreigner, unfamiliar with the English language, engaged at the bottom of the industrial scale as a common laborer. The evidence shows that his regular work was that of trucking full boxes; in connection with which there was obviously no such danger as that from which the accident arose, since such truck loads were only piled to a height of from two to two and one-half feet. There is no evidence in the record that the plaintiff ever, before this accident, trucked a load so high that he could not see over the top of it, and upon the question of whether or not the plaintiff ever trucked a load so empty loads at all, there is a direct conflict in the testimony:

In this state of the record we are unable to say that the manifest weight of the evidence shows either that the hazard causing the accident was, or should have been, known to the plaintiff.

Defendant also contends that the overwhelming weight of the evidence shows that plaintiff was guilty of contributory negligence. From a careful review of all the evidence in the case, we are unable to say that plaintiff did not exercise all the care which his circumstances at and before the accident allowed. This question, like the question of assumed risk, was passed upon by a jury properly and fully instructed as to the law, and the motion for a new trial was considered and overruled by the presiding judge. In view of these facts we are unable to disregard the verdict and the action of the trial court unless we can say that the verdict is contrary to the manifest weight of the evidence on some essential issue involved. (North Chicago St. R. Co. v. Cooper, 86 Ill. App. 216; St. Louis National Stock Yards v. Godfrey, 201 id. 48; Chicago & Alton R. R. Co. v. Corson, id. 113; Black v. Harris, id. 477; Snyder v. Illman, id. 478; Gillam v. Foster, 200 id. 87; Village of Greenville v. Court, 97 id. 518.) and this, upon a careful review of the whole record, we are unable to do.

In view of our conclusions in regard to the points raised by the defendant, it is not necessary to consider the cross errors assigned by plaintiff. The judgment will be affirmed.

AFFIRMED.

2171

No. - 2171.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

[illegible] CONTAINING [illegible] ONE HUNDRED [illegible] LITERS, [illegible] SHELL LOAD, [illegible],
Claimant, Plaintiff in Error.

Error to [illegible] County of Cook.

193 I.A. 324

MR. [illegible] delivered the opinion of the court.

The facts in this case are substantially the same as in No. 2171, People of the State of Illinois v. Fifty Cases Containing [illegible] Quart, Some of Less, of Shell Lard, Perfection Pur Company, and is governed by the decision in that case.

Affirmed.

243 - 21224.

CHARLES NEBEKER,
Appellee,

vs.

R. PIPER COMPANY,
a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 325

MR. JUSTICE O'CONNOR delivered the opinion of the court.

~~This is an~~ Action to recover damages alleged to have been sustained by the appellee (hereinafter called the plaintiff) as a result of the running away of a team owned by the appellant (hereinafter called the defendant), whereby plaintiff's horse and wagon were damaged. The cause was submitted to the court without a jury, and there was a finding and judgment for the plaintiff for $94.10. The facts are these:

Plaintiff's horse was hitched to a wagon and was standing on the north side of Madison street in the village of Forest Park, facing west. The team and wagon belonging to the defendant, in charge of a driver, was delivering bread in said village, and it being about noon, the driver drove the team into a shed, which was in a yard immediately adjoining Madison street. The shed was about 40 or 50 feet inside of the yard. The yard was enclosed with a fence, there being two entrances to the same. The driver took the bridles off the horses and hung them on the hames, fed his team, and then went into a restaurant, which was situated near the yard, to eat his dinner. About five minutes thereafter, he looked out and the team

copy from here

over

was gone. In some manner not disclosed by the evidence, the team got out on Madison street and turned east, running away. They ran into plaintiff's horse and wagon. Plaintiff's horse was injured and parts of the wagon shafts broken. On account of the injuries the plaintiff was unable to afterwards use the horse. The value of the horse was placed by a witness ~~who testified~~ on behalf of the plaintiff to be from $100 to $125, while a witness testified on behalf of the defendant that the horse was not worth to exceed $50. There was also evidence as to other items of damage incurred.

Pay to [illegible] only

The defendant contends that there is a fatal variance between the plaintiff's statement of claim and the proof, in that the statement of claim averred that the defendant's team and wagon were left "unattended, unhitched and ungarded" in Madison street, while the evidence showed that the team was left unattended and unhitched in the yard adjoining Madison street. This action is one of the fourth class, where the plaintiff's claim need not be set up with as much particularity as is required in a declaration. The contention is without merit.

The defendant next contends that there was no evidence of negligence on the part of the defendant, the argument being that the only evidence of any possible negligence was the fact of the team's running away "unattended by the driver and with the bridles fastened to the hames. This might cause some presumption of negligence, but certainly does not establish a case of negligence ~~but as~~ under an allegation where the only ground of negligence is that of leaving the team standing unattended in and upon a

was gone. In some manner not disclosed by the evidence, for some qtr not an Indian stepped out turned east, running away. They met into Plaintiff's horse and wagon. Plaintiff's horse was injured and parts of the wagon broken. As a result of the injuries the Plaintiff was unable to attend to his own ~~his~~ horse. The value of the horse was placed by a witness ~~[illegible]~~ on behalf of the Plaintiff to be from $100 to $125, while a witness ~~[illegible]~~ testified on behalf of the defendant that the horse was not worth to exceed $50. There was also evidence as to extra items of damage incurred.

The defendant contends that there is a fatal variance between the Plaintiff's statement of claim and the proof, in that the statement of claim averred that the defendant's team and wagon were left "unattended, unhitched and ungraded" in Dunlevy street, while the evidence showed that the team was left unattended and unhitched in the yard adjoining Dunlevy street. This action is one of the tortuous class, where the Plaintiff's claim need not be set up with as much particularity as is required in a declaration, the contention is without merit.

The defendant next contends that there was no evidence of negligence on the part of the defendant, the accident being due to the only evidence of any possible negligence was the fact of the team's running away "unattended" or by the drivers unhitching the horses tethered in the house. This might come under presumption of negligence, but certainly does not establish a case of negligence. The mere fact of disappearance does not prove of negligence in that of leaving the horse standing unattended in and upon a

While some cases hold that negligence may not be inferred from the mere fact of a runaway (Collier v. Knox, supra.), there are a great many cases to the contrary. See Sokoll v. Brown & B. Lumber Co. (N.J.L.) 71 Atl. 120, and other cases cited in note, 23 L.R.A., 171. Yet the fact of the runaway, taken in connection with the other circumstances attending the same, tended to establish negligence, even in the absence of direct evidence thereof. In the case at bar we are of the opinion that there was sufficient evidence of negligence on the part of the driver of defendant's team to sustain the finding and judgment.

The defendant further contends that the court erred in refusing to admit evidence offered by the defendant as to the gentle disposition, etc. of the team. In this contention we cannot concur. Plaintiff was not claiming that the horses were other than gentle, but based his right of recovery on the negligence of the defendant in the control and management of the team.

Finding no substantial error in the record, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

While some cases hold that negligence can not be inferred from the mere fact of a crossing (Miller Vs. Lyons, supra.), there are a great many cases to the contrary. See Kimball Vs. Bryan & St. Louis Ry. (S.C.Mo.) 91 S.W. 1.c., and other cases cited in note, 10 L.R.A., 1V1. The fact of the runaway, taken in connection with the other circumstances attending the case, issued to establish negligence, even in the absence of direct evidence thereof. In the case at bar we are of the OPINION that there was suffi-cient evidence of negligence on the part of the driver of defendant's team to sustain the finding and judgment.

The defendant further contends that the court erred in refusing to admit evidence offered by the defendant as to his gentle disposition, etc. of the team. In this contention we cannot concur. Plaintiff was not claiming that the horses were other than gentle, but denied the right of recovery on the negligence of the driver in the control and management of the team.

Finding no substantial error in the record, the judgment of the municipal Court of Chicago will be affirmed.

AFFIRMED.

21282

299 - 21282.

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
Appellee,

vs.

ILLINOIS BRICK COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 327

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from a judgment rendered by the Municipal Court in favor of the plaintiff (appellee) and against the defendant (appellant) for $1669.46.

During the month of August, 1911, the plaintiff railroad company hauled for the defendant over its railroad 156 carloads of brick from Blue Island, Illinois to Chicago, for which it charged $9 per car load. The defendant having failed to pay the freight charges, this action was brought.

It was not disputed that the rate charged was reasonable and in compliance with the schedules filed with the Interstate Commerce Commission and the Railroad and Warehouse Commission of Illinois, and was less than the maximum rate as fixed by the said Railroad and Warehouse Commission. The defendant was that the plaintiff during the month of August, 1911, hauled brick from Chicago Heights, Illinois, to Chicago, a distance of 30 miles, for $5.50 per carload, over the same track as that on which it hauled the brick for the defendant from Blue Island to Chicago, a distance of but 18 miles,

This is an appeal from a judgment rendered by the municipal court in favor of the plaintiff (appellee) and against the defendant (appellant) for $[illegible].

During the month of August, 1911, the plaintiff railroad company hauled for the defendant over its railroad 180 carloads of brick from Blue Island, Illinois to Chicago, for which it charged $2 per car load. The defendant having failed to pay the freight charges, this action was brought.

It is not disputed that the rate charged was reasonable and in compliance with the schedules filed with the Interstate Commerce Commission and the Railroad and Warehouse Commission of Illinois, and was less than the maximum rate as fixed by the said railroad and Warehouse Commission. The evidence tends to show that the plaintiff during the month of August, 1911, hauled brick from Chicago Heights, Illinois, to Chicago, a distance of 30 miles, for $2.50 per carload, over the same track on that on which it hauled the brick for the defendant from Blue Island to Chicago, a distance of but 12 miles.

for which plaintiff charged the defendant $9 per carload; that this was unjust discrimination and contrary to law, and that the defendant should not be required to pay more than that charged by the railroad company for hauling from Chicago Heights -- $5.50 per carload, and that therefore plaintiff's claim for $1447.34 is excessive in the sum of $478.

The defendant contends that when the evidence showed that it had been charged more for hauling a carload from Blue Island to Chicago than was charged other parties for hauling the same kind of a carload from Chicago Heights to Chicago, over the same track, it had established a prima facie case of unjust discrimination, the argument being that this evidence showed a violation by the plaintiff of sections 2 and 3 of an Act to Prevent Extortion and Unjust Discrimination, Hurd's Revised Statutes, (1911), p. 1835, and section 25 of the Railroad and Warehouse Commissioners Act, Hurd's Revised Statutes, (1911), p. 1854. Said sec. 2 provides that if any railroad shall make any unjust discrimination in its rates for freight or passenger transportation, it shall be deemed guilty of violating said act. Said sec. 3 provides that if any railroad shall charge for transportation of passengers or freight a greater toll or compensation for any distance than is charged for a greater distance for a like quantity of freight over the same line, in the same direction, directly, or by means of any rebate, drawback, or other shift or evasion, such act "shall be deemed and taken, against such railroad corporation, as prima facie evidence of the unjust discriminations prohibited by the provisions of this act." Said sec. 25 declared it to be unlawful for any common

for which plaintiff charged the defendant $2 per carload; that this was unjust discrimination and contrary to law, and that the defendants should not be required to pay more than that charged by the railroad company for hauling from Chicago Heights -- $5.85 per carload, and that therefore plaintiff's claim for $1444.84 is excessive in the sum of $472.

The defendants contended that when the evidence showed that it had been charged for hauling a carload from the island to Chicago that was charged other parties for hauling the same kind of a carload from Chicago Heights to Chicago, over the same track, it had established a prima facie case of unjust discrimination, the defendant being met this evidence showed a violation by the plaintiff of sections 2 and 3 of an act to regulate interstate and foreign transportation, Smith's Revised Statutes, (1911), p. 1888, and section 29 of the Railroad and Warehouse Commission Act, Smith's Revised Statutes, (1911), p. 1894. Sec. 2 provides that if any railroad shall make any unjust discrimination in its rates for freight or passenger transportation, it shall be deemed guilty of violating said act. Sec. 3 provides that if any railroad shall charge for transportation of passengers or freight a greater toll or compensation for any distance than is charged for a greater distance for a like quantity of freight over the same line, in the same direction, directly, or by means of any rebate, drawback, or other shift or device, such act "shall be deemed and taken, against such railroad corporation, as prima facie evidence of the unjust discriminations prohibited by the provisions of this act." Sec. 29 declares it to be unlawful for any common

NOTE

carrier to charge or receive any greater compensation in the aggregate for a shorter than for a longer distance over the same line, or to charge any greater compensation as a through route than the aggregate of the intermediate rates; and declared that said section should not be construed as authorizing the carrier to charge or receive as great compensation for a shorter as for a longer distance. Said section provided, however, that upon application of the carrier the commission might, in special cases, after investigation, permit the carrier to charge less for longer than for shorter distances and prescribe the extent to which the carrier should be relieved from the prohibition against an equal or greater charge for a shorter than a longer distance.

The plaintiff's position was that the rates charged defendant were reasonable, and that the reason for the difference in the charges made for the hauling of freight ~~is that~~ In 1898 the railroad company entered into a written contract with a land association of Chicago Heights whereby the association conveyed land to the railroad company for right of way and for other purposes, in consideration of which the railroad company agreed that its freight charges for hauling carload lots from Chicago Heights to Chicago should, for a period of 99 years, be $5.50 per carload; ~~but~~ In 1910, when it attempted to raise the freight charges from Chicago Heights to Chicago, it was enjoined by the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, from doing so, which ~~and that the~~ injunction is still in full force and effect, the court holding ~~xxx~~ said contract to be valid and binding. ~~In view~~

charge a carrier or receive or transport any property
in the aggregate for a shorter than for a longer dis-
tance over the same line, or to charge any greater
compensation as a through route than the aggregate of
the intermediate rates; and declared that said section
should not be construed as authorizing the carrier to
charge or receive as great compensation for a shorter as for
a longer distance. Said section provided, however, that
upon application of the carrier the commission might, in
special cases, after investigation, permit the carrier
to charge less for longer than for shorter distances and
prescribe the extent to which the carrier should be re-
lieved from the prohibition against an equal or greater
charge for a shorter than a longer distance.

The plaintiff's position is that the rates charged
defendant are reasonable, and that the reason for the
difference in the charges made for the hauling of freight
in that in 1889 the railroad company entered into a written
contract with a land association of Chicago Heights whereby
the association conveyed land to the railroad company for
right of way and for other purposes, in consideration of
which the railroad company agreed that its freight charges
for hauling carload lots from Chicago Heights to Chicago
should, for a period of 99 years, be $3.50 per carload;
that in 1910, when it attempted to raise the freight charges
from Chicago Heights to Chicago, it was enjoined by the
Circuit Court of the United States for the Northern District
of Illinois, Eastern Division, from doing so, and that the
injunction is still in full force and effect. The court
has not all evidence to be taken and filed.

of all the facts in this case, we are of the opinion that defendant has not established the defense of unjust discrimination, and as the rate charged the defendant was legally established and reasonable, the action of the court in instructing the jury to find for the plaintiff was correct.

The defendant also contends that the court erred in allowing the plaintiff interest on the amount of its claim; that interest is never allowable in the absence of an agreement, except as provided by statute. This is undoubtedly a correct statement of the law. The statute, sec. 2, chap. 74, Ward's Revised Statutes, provides, inter alia, that interest may be allowed "on money withheld by an unreasonable and vexatious delay of payment." In the case at bar, all of the freight was hauled during the month of August, 1911, and plaintiff's claim was then due and payable. Suit was not brought until August 29, 1913. On the trial on the question of the allowance of interest, the record is as follows:

"MR. BARTON: I close my case and will ask the court to instruct the jury to find a verdict for the plaintiff for the sum of $1669.46, being $1447.34 principal and $222.12 interest.

"THE COURT: Is there any dispute as to the amount?

"MR. STRUCKMANN: I presume the computation is right but I object to the instruction to the jury and I could like to be heard on that, on the legal proposition, before the court instructs the jury.

"MR. BARTON: You can be heard on the motion for a new trial.

"THE COURT: The jury will be instructed to bring in a verdict in favor of the plaintiff and against the defendant for $1669.46."

From this it clearly appears that no objection was

of all the [illegible] in [illegible], -- one of the qualities that distinguished him and established the history of modern civilization, and at the same change the defendant was legally established and recognized, the action of the court in enforcing the jury to live for the plaintiff was unwarrant.

The defendant also contends that the court erred in allowing the plaintiff interest on the amount of the claim; that interest is never allowable in the absence of an agreement, except in cases by statute. This is substantially a correct statement of the law. The statute, sec. 3, chap. 74, Burch's Revised Statutes, provides, inter alia, that interest may be allowed "on money withheld by an unreasonable and vexatious delay of payment." In the case in hand, all of the freight was needed during the month of August, 1911, and plaintiff's claim was then due and payable. Suit was not brought until August 27, 1913. On the trial on the question of the allowance of interest, the record is as follows:

"MR. MASTON: I move by reason and will ask the court to instruct the jury to find a verdict for the plaintiff for the sum of $1881.42, being $1847.34 principal and $33.12 interest.

"THE COURT: Is there any dispute as to the amount?

"MR. STUCKEBERG: I assume the computation is right but I object to the instruction to the jury and I would like to be heard on that, on the legal proposition, before the court instructs the jury.

"MR. MASTON: You can be heard on the motion for a new trial.

"THE COURT: The jury will be instructed to bring in a verdict in favor of the plaintiff and against the defendant for $1881.42."

From this it clearly appears that no objection was

made to the allowance of interest. The question was not presented to the trial court, and it has long been established that a party cannot raise a question of this nature for the first time in a court of review.

Finding no substantial error in the record, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

231 - 21677.

PEOPLE, ex rel. EDWARD A. SCHULT,
Plaintiff in Error,

vs.

LUDWIG SIEMS and GRETA SIEMS,
Defendants in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

193 I.A. 342

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case seeks to review an order entered by the Circuit Court of Cook County quashing a writ of habeas corpus and dismissing the petition at plaintiff in error's cost and remanding the infant child of plaintiff in error to the custody of the defendants in error. The parties will, for convenience, be designated as relator and respondents. The facts are these: The infant child involved in this controversy was the daughter and only child of the relator, and the granddaughter of the respondents. The relator was a man about 32 years of age, ~~and~~ residing in the village of Laporte, Minnesota, in which village he has resided in ~~said state~~ practically all his life. On February 25, 1911, he was married to the daughter of the respondents at Kenosha, Wisconsin. Respondents' daughter and the relator were cousins of the first degree, and prior to said marriage she lived with her parents in Chicago. She visited the relator and other relatives in Minnesota and there became engaged to marry the relator. Afterwards the relator came to Chicago to be married, but found that the law of this state prohibited marriages between cousins

of the first degree. Thereupon, he, together with the respondents, and said daughter, proceeded to Wisconsin where the marriage ceremony was performed. They all immediately returned to Chicago, and within a day thereafter, the relator and his wife went to their home in Minnesota, where they continued to live together as husband and wife until April 10, 1914, when she died. Vivian Dorothy Schutt, the child in question, was the only child born to relator and his wife and was about two years old when her mother died. She was not very strong physically, and about three weeks after her mother's death was taken to the home of the respondents in Chicago, where she still lived. About December 11, 1914, relator was notified by publication that respondents had filed a petition in the County Court of Cook County for the adoption of said child. December 24, 1914, relator visited the respondents and the child, and on the 28th of the month demanded that the respondents deliver to him his child, which they refused to do. Thereupon the petition in this case was filed.

The respondents contend that the custody of the child was turned over to them by agreement "so that they could raise her to maidenhood, the father, however, to have the right to visit said child at reasonable times;" that this was done at the dying request of the child's mother; that she was well taken care of and had a good home in Chicago, and that it is to the best interests of said child that she stay with respondents.

of the first degree. Thereupon he, together with the respondents, and said daughter, proceeded to Wisconsin where the marriage ceremony was performed. They all immediately returned to Chicago, and within a day thereafter, the relator and his wife went to their home in Minnesota, where they continued to live together as husband and wife until April 10, 1914, when she died, leaving surviving relator, the child in question, the only child born to relator and his wife and was about two years old when her mother died. She was not very strong physically, and about three weeks after her mother's death was taken to the home of the respondents in Chicago, where she has lived [illegible] About December 11, 1914, relator was notified by publication that respondents had filed a petition in the County Court of Cook County for the adoption of said child. December 14, 1914, relator visited the respondents and the child, and on the 16th of the month demanded that the respondents deliver to him his child, which they refused to do. Thereupon the petition in this case was filed.

The respondents testified that the custody of the child was turned over to them by agreement and that they would raise her to womanhood, the relator, however, to have the right to visit said child at reasonable times; that this was done at the dying request of the child's mother; that she is being well taken care of and had a good home in Chicago, and that it is to the best interests of said child that she stay with respondents.

The parent has the right to the custody of his child as against the world unless he has forfeited his right, or the welfare of the child demands that he be deprived of it. Sullivan v. The People, 224 Ill. 468; Cormack v. Marshall, 211 Ill. 519; Hohenadel v. Steele, 237 Ill. 229. The controlling element is the welfare of the child, and this is not to be determined solely from the financial standing of the parties. In Cormack v. Marshall, supra, the court say, p. 523: "We regard the rights of the parent as superior to those of any other person, when that parent is a fit person to have the custody of children and is so circumstanced that he can provide the necessaries of life and administer to the requirements of such a charge. The mere fact that some other person may have more money or property in any form is not one that appeals to us." In the case at bar there is evidence tending to show that the respondents may be able to furnish the child with a more comfortable home than the relator, but we have no doubt from the evidence that the relator is a fit and proper person and sufficiently able to support and care for his child. The evidence tends to show that the relator was very fond of his child and that he did not intend in anyway to surrender any of his rights by turning her over to respondents; that he is a strong healthy man, is a carpenter and contractor, and engaged in the lumber business; that he has held positions of public trust, such as assessor, member of the village council, etc.; that he is honest and industrious, and has no bad habits; that he has had some financial reverses occasioned by the destruction by fire of relator's lumber-yard and was indebted in several small sums; that he was earning

about $100 per month; that he had arranged with a family living in Minnesota to take care of himself and child. Respondents further contended and the court found that the relator and his wife were married in Wisconsin to evade the laws of Illinois; that the marriage was incestuous and void ab initio; that the respondents are proper persons to have the custody of the infant child, and that it was for the child's best interest to be remanded to their custody.

~~The laws of Wisconsin and Minnesota were introduced in evidence, showing that cousins of the first degree may lawfully marry in said states. The legality of a marriage taking place in a foreign state, when questioned in Illinois, is to be adjudged by the law of the foreign state (Reifschneider v. Reifschneider, 241 Ill. 92), except where the marriage is in violation of some positive law of this state. Wilson v. Cook, 235 Ill. 460. In the case at bar, the parties having been married in Wisconsin, the legality of the marriage must be adjudged by the laws of Wisconsin (Reifschneider vs. Reifschneider, supra; Lyon v. Lyon, 230 Ill. 384; McDeed v. McDeed, 67 Ill. 545; Butler v. Butler, 161 Ill. 481), unless the parties have violated some positive law of this state. In the case of Wilson v. Cook, supra, it was held that a marriage between two citizens of this state who went to the state of Missouri, and were there married, and immediately returned and resided in this state, the marriage having taken place within one year after one of the parties had been divorced, was void.~~

about five per cent; they be not invested with a [illegible] living in Hammonds in both sorts of liquor and drink. Shoemaker Tuckin: confirmed the [illegible] found that his father and his wife were married in Illinois to avoid the laws of Illinois; that the marriage was consummated but with the intent that the respondents are going forward to have the custody of the infant child, and that it is not not unlike but believed it be presumed in their opinion.

The laws of Illinois are [illegible] in evidence, showing that marriage of the first degree may lawfully marry in said state. The legality of a marriage taking place in a foreign state, when questioned in Illinois, is to be adjudged by the law of the foreign state (Hutchinson v. Hutchinson, 143 Ill. 99), except where the marriage is in violation of some positive law of this state. Lemon v. Hunt, 143 Ill. 444. In the case at bar, the parties having been married in Kentucky, the legality of the marriage must be adjudged by the laws of Kentucky (Hutchinson v. Hutchinson, supra; Moore v. Moore, 147 Ill. 244; Lewis v. Lewis, 97 Ill. 340; Miller v. Miller, 141 Ill. 162), unless the marriage violated some positive law of this state. In the case of Miller v. Miller, supra, it was held that a marriage between the children of this state who went to the state of Kentucky, and there married, and immediately returned and resided in this state, the marriage being same, then which the [illegible] of the parties had been divorced, was void.

The court there say, p. 463: "Every State has the power to enact laws which will personally bind its citizens while sojourning in a foreign jurisdiction provided such laws profess to so bind them, and to declare that marriages contracted between its citizens in foreign States in disregard of the statutes of the State of their domicile will not be recognized in the courts of the latter State though valid where celebrated." The court quoted with approval from the case of Lanham v. Lanham, 136 Wis. 360, as follows: "It (the law prohibiting marriage within a year after divorce) seems unquestionably intended to control the conduct of the residents of the State , whether they be within or outside of its boundaries. Such being, in our opinion, the evident and clearly expressed intent of the legislature, we hold that when persons domiciled in this State and who are subject to the provisions of the law leave the State for the purpose of evading these provisions, and go through the ceremony of marriage in another State and return to their domicile, such pretended marriage is within the provisions of the law and will not be recognized by the courts of this State." In the Wilson case residents of this state, left this state and went to the state of Missouri for the purpose of evading the statutes of this state, went through the marriage ceremony in Missouri, and immediately returned to Illinois. The court there held that such marriage was vaid. In the case at bar, the relator was not a resident of this state but was a resident of Minnesota. He had a right to go to Wisconsin and be married and then return to his home in Minnesota, the law in both of those states permitting marriages be-

The court in its opinion, p. 1021: "Every State has the inherent
to enact laws which will permanently bind its citizens
while sojourning in a foreign jurisdiction provided such
laws purport to be kind laws, and to provide that marriages
contracted between its citizens in foreign states in sim-
ilarly of the statutes of the State of domicile will
not be recognized in the courts of the native State which
would thus be defeated." The court having well expressed
from the case of Hudson v. Hudson, 126 Ga. 844, as follows
"It (the law prohibiting marriage within a year after divor-
ce) unquestionably intended to control the conduct of the
residents of the State, whether they be within or outside
of its boundaries. Such being, in our opinion, the intent
and clearly expressed intent of the legislature, we hold
that when persons domiciled in this State who are
subject to the prohibition of the law leave the State for
the purpose of evading these provisions, and go through
the ceremony of marriage in another state and return to
their domicile, that prohibited marriage is within the
provisions of the law and will not be recognized by the
courts of this State." In the Pierce case residents of
this state, left this state and went to the state of
Kentucky for the purpose of evading the provisions of this
state, went through the marriage ceremony in Kentucky,
and immediately returned to Illinois. The court there
held that such marriage was void. In the case at bar,
the parties were not a resident of this state but was a
resident of Minnesota. He had a right to go to Kentucky
and be married and then return to his home in Minnesota,
the law in both of these states prohibiting marriages be-

tween cousins of the first degree. The marriage was, therefore valid and binding. Under all the facts in this case, we have no hesitancy in holding that the relator is entitled to the custody of his child.

The case will therefore be reversed and the cause remanded, with directions that the child, Vivian Dorothy Schutt, be delivered to the custody of her father, the relator.

REVERSED AND REMANDED WITH DIRECTIONS.

[illegible] consists of the first degree. The marriage was, therefore, valid and binding. Under all the facts in this case, we have no hesitancy in holding that the relator is entitled to the custody of his child.

The case will therefore be reversed and the cause remanded, with directions that the child, Vivian Dereby Schmitt, be delivered to the custody of her father, the relator.

REVERSED AND REMANDED WITH DIRECTIONS.

6 - 21420

MARY KRAUS,
Defendant in Error,

vs.

NATIONAL COUNCIL, KNIGHTS AND LADIES OF SECURITY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 345

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff claims on a benefit certificate issued by defendant on the life of Julia Kraus, her mother, who died December 29, 1912. Upon trial she had judgment for $954.

Among the grounds for reversal presented we shall note only one. This case involves facts substantially like those involved in Meenan v. National Council, Knights and Ladies of Security, 188 Ill. App. 490. Description of the plan of insurance, with benefit certificates and by-laws of the defendant material to the point in the instant case, may be found in the opinion filed in that case.

By defendant's by-laws it ~~is~~ was provided that -

"All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month, shall, by the fact of such non-payment, stand suspended without notice, and no act on the part of the Council or any officer thereof, or of the National Council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited. No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the Order, with reference to reinstatement."

It ~~is~~ was also provided that a member might be reinstated by payment within 60 days from date of suspension of all arrearages, "provided, however, That he be in good health at the time of making payment * * * provided, further, That

the receipt and retention of such assessments or dues, in case the suspended member is not in good health . . shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his Benefit Certificate."

~~It is hardly controverted that the~~ It was not Decedent's assessment for September, 1912, was not paid during that month, whereby ~~this fact was sufficiently proved. Hence~~, under the automatic operation of the by-laws ~~Julia Kraus~~ she became suspended, and subsequent payment would operate to reinstate her only on condition that at the time of such payment she was "in good health." A payment was made on October 7, 1912. Therefore, the critical question is, was she in good health on that date? If she was not, the payment was ineffective to reinstate her. She died December 29, 1912, and if not reinstated she was not "in good standing" - a condition necessary to impose liability upon the defendant.

~~We are of the opinion that~~ There was evidence ~~demonstrates~~ that on October 7, 1912, ~~Julia Kraus~~ decedent was afflicted with mitral regurgitation - a valvular disease of the heart - and that she had been under the care of a physician for this disease for several months prior thereto; that because of this disease and its consequences she was confined to the house for some eight months before her death; that the disease progressed, with the usual dropsical conditions, until it caused her death. ~~That she was not "in good health" on October 7th is proved beyond reasonable controversy.~~

Although counsel for plaintiff seems to attempt to cast some doubt upon the competency of the evidence that the September assessment was not paid, yet we are of the opinion that this fact was properly proved. There can be no serious contention that the payment made on October 7th was

the recent and retention of such measurements by case, in case the applicant doctor is not in good health - " will not have the effect of reinstating such doctor or of utilizing him or his benefiaries to any rights under his benefit certificate."

It is [illegible] understood that the assessment for September, 1919, was not paid during that month. What last was sufficiently proved, however, under the not unlike circumstances of the 19-item claim, Jesse [illegible] suspended, and subsequent payment would operate to reinstate her only on condition that at the time of such payment she was "in good health". A payment was made on October 7, 1919. There-

fore, the critical question is, was she in good health on that date? If she was not, the payment was ineffective to reinstate her. The date, October 3, 1919, and if not reinstated she was not "in good standing" - a condition necessary to impose liability upon the defendant.

[illegible] between that on October 7, 1919, [illegible] the affected with mitral regurgitation - a valvular disease of the heart - and that she had been under the care of a physician for this disease for several months prior thereto; that because of this disease all its consequences are not confined to the heart for some eight months before her death; that the disease progressed, -the same [illegible] until it caused her death. [illegible]

Defendant moved for directed verdict on ground that to make case hinge upon the consequence of the evidence that the applicant assessment was not paid, yet no one of the opinion that this fact was specially stated. [illegible] defendant contended that [illegible] of Section 7[illegible]

an attempt to pay the assessment due in October. The suspension for non-payment operated automatically, and no order by the defendant society was necessary.

Many points presented in this case are discussed in the opinion in the Keenan case, supra, with abundant citations. What is there said applicable to the present contentions meets with our approval.

There can be no recovery in this case, and the judgment of the Municipal Court is reversed with a finding of facts, and judgment for the defendant entered here.

REVERSED.

6 - 21420 FINDING OF FACTS.

We find that the insured, Julia Kraus, failed to pay the September, 1912, assessment and dues, and thereby became suspended as a member of the defendant society; that she was not in good health on October 7, 1912, and that the payment made on that date did not operate to reinstate her; that she was not a member of the defendant society in good standing at the time of her death, and hence it is not indebted to the plaintiff, Mary Kraus, upon the benefit certificate sued on.

4 - [illegible]

[illegible]

[illegible] Land [illegible] Jesus [illegible] Jesus, Joined by any [illegible], [illegible], Mary, [illegible] and Luke, who already over-[illegible] as a member of [illegible] society; that [illegible] was not in good health on [illegible] 7, 1911, [illegible] [illegible] ment made on [illegible] [illegible] [illegible] [illegible]; [illegible] are not a member of [illegible] society in good standing at the time of her death, and hence it is not [illegible] to the [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible].

35 - 21681

GEORGE L. TRAFTON, Guardian of Alfonso Cadamartrie, Louise Cadamartrie and Jennie Cadamartrie,
Defendant in Error,

vs.

NATIONAL COUNCIL, KNIGHTS AND LADIES OF SECURITY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 347

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

~~Plaintiff, bringing suit on a benefit certificate issued to Flora Cadamartrie, had judgment for $267.50.~~

This case in its general features and as to the ~~general~~ question involved is similar to the case of Kraus v. ~~the same defendant, 144~~ National Council Knights & Ladies of Security, p. —, opinion filed this day, and Keenan v. ~~same defendant~~ Same, 186 Ill. App. 490. Reference is made to the opinions in these cases for description of the character of the benefit certificate and the by-laws.

The defense in this case ~~is~~ was that the insured did not pay the assessment under the certificate for the month of July, 1913, before the last day of the month, and for that reason, under the by-laws, she became suspended, and that on August 26, 1913, when she paid the July and August assessments, she was not in good health, a condition necessary to reinstatement. The question to be determined is whether the insured was in good health on August 26, 1913, for, as has been held in these other cases, if she was not in good health at this time the payment did not operate to reinstate her, and therefore under the terms of the policy she was not in good standing in the society at the time of her death and hence cannot recover upon the benefit certificate.

It was proved ~~beyond controversy~~ that on August 28, 1913, the insured was suffering from a tumor of the uterus, with pressure symptoms which, in the opinion of her physician, required the removal of the tumor. Upon his advice she was taken to a hospital and on August 30th an operation was performed removing the tumor and also the uterus, fallopian tubes and ovaries. The tumor was about the size of a fist; the doctor describes it as "quite a large tumor." It is also not controverted that this tumor had been growing for a period of at least several months prior to this time. Immediately after the operation her heart began to fail, the doctor testifying, "there was a weak heart-muscle, the heart wasn't strong enough to carry her along during the convalescence." She died on September 2nd. ~~It is self evident that a person suffering from a tumor of this size and character, which necessitated such a major operation, was not in good health.~~

~~Upon is said by plaintiff's counsel concerning the insured's appearance on August 26th, and~~ There was testimony to the effect that she appeared to be in good health on Aug. 26th. ~~Appellate Court decisions cited to the effect that all that~~ is necessary under such circumstances is the appearance of good health to observers, we are not inclined to follow. We understand the words "good health" to mean that a person is in a reasonably good state of health and free from any disease or illness that tends seriously or permanently to weaken or impair the constitution. In so holding we are following the decision in Court of Honor v. Dinger, 221 Ill. 176. Tested by this definition the insured was not in good health.

~~The~~ contention that ~~the~~ by-laws were not properly introduced in evidence, ~~is without merit.~~ They were certified under the hand of the national secretary, with the seal of the society affixed. ~~This is in compliance with section 15,~~

chapter 51, Illinois Statute on Evidence and Depositions.

It is also contended that the defendant waived the provision of the by-laws with reference to good health when the financier of the society accepted the assessment on August 26th. We do not agree with this contention. Even if the mere acceptance of the assessment by the financier having knowledge that the insured was in poor health might operate as a waiver - and upon this we express no opinion - there was not only no evidence in the record that the financier in this case knew that the insured was not in good health, but the entire contention of plaintiff's counsel is that on the date the assessment was paid the insured appeared to be free from disease and in good health. As has been held in the two cases first cited, it appears beyond controversy that the insured was not in good health at the time the assessment in arrears was paid. Therefore payment did not operate to reinstate her, and there is no liability on the defendant upon the benefit certificate.

Other questions are suggested, especially the question as to the right of the defendant to open and close the argument, but in the view we have taken it is unnecessary to discuss these.

The judgment is reversed and judgment of nil capiat will be entered in this court.

REVERSED.

chapter 14, Illinois statute on evidence and impositions,

It is also contended that the policies issued

the provision of the by-laws with reference to good health

when the financier of the society accepted the assessment on

insured also. [illegible]

the date preceding of the assessment by the financier having

ascertained that the insured was in good health [illegible]

by a review - but upon this we express no opinion - there

was not only no evidence in the record that the financier in

this case knew that the insured was not in good health, but

the entire consideration of plaintiff's counsel is that on the

date the assessment was paid the insured appeared to be free

from disease and in good health. As has been said in the two

cases first cited, it appears beyond controversy that the in-

sured was not in good health at the time the assessment in

question was paid. Therefore payment did not operate to in-

stitute her, and there is no liability on the instrument upon

the benefit certificate.

Other questions are suggested, but clearly the

conclusion as to the right of the defendant to rely and claim

the exemption, but in the case in view that it is unnecessary

to discuss them.

The judgment is reversed and judgment at the

[illegible] will be entered in this court.

Reversed.

35 - 21681 FINDING OF FACTS.

We find that the insured, Flora Cadamartrie, failed to pay the July, 1913, assessment, and thereby became suspended as a member of the defendant society; that she was not in good health on August 26, 1913, and that the payment made on that date did not operate to reinstate her; that she was not a member of the defendant society in good standing at the time of her death, and hence it is not indebted to the plaintiff, George L. Trafton, upon the benefit certificate sued on.

11 - 21531

CHAS. M. JOHNSON,
Defendant in Error,

vs.

CLARENCE H. MORGAN and IRA S. FERGUSON,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 350

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

~~Plaintiff brought suit against defendants.~~ Ferguson was not served with summons, and suit proceeded by trial by the court to judgment for $317.50 against Morgan, who seeks reversal ~~to have this reversed~~. An order severing Ferguson and permitting Morgan to prosecute his writ of error alone was ~~has been~~ entered in the Appellate ~~this~~ Court.

By his statement of claim plaintiff avers that defendants made a contract with him to deliver and convey certain land in Washburn County, Wisconsin, for a consideration of $300 which plaintiff paid, but defendants breached this contract and have failed and refused to deliver and convey the land, to the damage of plaintiff.

Plaintiff testified that he met Ferguson "and talked to him in regard to some lots at Long Lake in Washburn County, Wisconsin." This was ~~is~~ the only evidence as to any contract. Plaintiff then introduced a warranty deed whereby defendants conveyed to plaintiff a number of lots in Washburn County, Wisconsin. The deed appears to be in proper form; and it was duly delivered to plaintiff. ~~Thus far the evidence fails to show any breach of any contract.~~ Plaintiff then says that he sent the deed to be recorded to the registrar of deeds of Washburn County, Wisconsin, but it was returned with a letter

from the registrar which said that the plat of the property mentioned in the deed had not been recorded. This is all of plaintiff's case. The letter purporting to have come from the registrar was incompetent, but even if we could consider it, it tended to prove nothing. Plaintiff therefore has failed to prove his claim of a breach of contract.

However, we have given consideration to the entire record and find the situation to be as follows: The lots conveyed by the warranty deed ~~are~~ were described as in certain blocks in "Orielle Park, a subdivision," etc. At the date of the delivery of the deed there was a subdivision, duly platted into blocks and lots, of that name. The lots mentioned in the warranty deed ~~can~~ could be readily identified and located from this plat. Upon the trial the plat seems to have been stricken from the record by the trial judge, which was improper as the plat is competent evidence. It sufficiently appeared that defendants supposed this plat had been recorded in the office of the registrar, but such was not the fact. It does appear that prior to this suit the tract called Orielle Park had been re-platted under another name, which latter plat had been recorded, that the blocks in this later plat were of the same size and numbered identially as the blocks of the Orielle Park plat, and that the lots mentioned in the deed could be identified and located on this later plat. A deed conveying to plaintiff these lots by more definite description in accordance with the later plat was offered for delivery to plaintiff provided he should withdraw his suit.

As we have indicated above plaintiff has failed to prove his case, and these latter considerations tend to support our conclusion that he is not entitled to recover anything from defendants. The judgment is reversed and judgment of nil capiat will be entered in this court. REVERSED.

21 - 21588

THOMAS C. DOLAN,
Defendant in Error,

vs.

HARRY A. LOKER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 352

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

April 16, 1914, judgment by confession for rent was entered against defendant. Subsequently he was allowed to defend, and after much delay and two trials judgment was entered against him for $250 which he seeks to have reversed.

There was evidence that on January 25, 1913, Jacob C. Paquet was the owner of an apartment building in Chicago, and on that date entered into a written lease with the defendant for an apartment, the term beginning May 1, 1913, and extending until April 30, 1914, the rent to be $42.50 per month. Subsequently, in April, 1913, Paquet sold the property to plaintiff, Dolan, and Loker's lease was assigned to plaintiff. J. M. McDonald appeared to have been acting as collector for Paquet, and he collected some rents for a short time after plaintiff became the owner of the building. Defendant said that on June 14, 1913, by agreement with plaintiff his lease was canceled and a new lease entered into expiring September 30, 1913, and as evidence of this he produced what purported to be a duplicate of the lease upon which judgment was entered, across the face of which is written these words: "Canceled June 14, 1913, J. M. McDonald, Agent." It was admitted that McDonald wrote this. Defendant also produced a memorandum which he himself had written, which is to the effect

Gen. No. [illegible]

[illegible], Defendant in Error,

v.

[illegible], Plaintiff in Error.

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

April 27, 1916, judgment by confession for rent was entered against defendant. Subsequently he was allowed to defend, and after much delay and two trials judgment was entered against him for $135 which he seeks to have reversed.

The ~~evidence discloses~~ [illegible] that on January 28, 1913, Jacob C. Jaquet was the owner of an apartment building in Chicago, and on that date entered into a written lease with the defendant for an apartment, the term beginning May 1, 1913, and extending until April 30, 1916, the rent to be $45.00 per month. Subsequently, in April, 1914, Jaquet sold the property to plaintiff, [illegible], and Jaquet's lease was assigned to plaintiff. J. C. [illegible] appears to have been acting as collector for plaintiff, and he collected some rents for a short time after plaintiff became the owner of the building. Defendant says that on June 14, 1915, by agreement with plaintiff his lease was canceled and a new lease entered into expiring September 30, 1915, and as evidence of this he produced what purports to be a duplicate of the lease upon which judgment was entered, across the face of which is written these words: "Canceled June 14, 1915, J. C. [illegible], Agent." It is admitted that [illegible] wrote this. Defendant also produced a [illegible] which he himself had written, which is to the effect

that the apartment had been leased to the defendant from July 1 to September 30, 1913, and upon this memorandum McDonald wrote his name.

The binding force of these memoranda depends upon the authority of McDonald to act and bind the plaintiff. Plaintiff testified that he could read and write and that he never authorized McDonald or anybody else to make the notation of cancellation across the lease, ~~and~~ that he did not see the paper prepared by defendant, nor McDonald write his name thereon, and that he never directed him to sign it. McDonald's authority to act in the matter ~~is~~ was denied by plaintiff. We have considered the evidence tending to contradict plaintiff, and are of the opinion that the conclusion of the trial court that McDonald had no authority to cancel the lease was justified.

As there was no cancellation of the lease defendant was bound by his obligation thereunder to pay rent. The judgment is proper and is affirmed.

~~AFFIRMED.~~

that the payment had been issued to the defendant Tom, July 1 in September 3, 1918, and upon this memorandum defendant rested his case.

The remaining three of these memoranda relate upon the question of intent to act and upon the plaintiff. Plaintiff testified that he could read and write and that he never authorized defendant or anybody else to make the notation of cancellation across the issue, and that he did not see the paper prepared by defendant, nor recognize the title as his own handwriting, and that he never directed him to sign it. Defendant's authority to act in the matter is denied by plaintiff. We have considered the evidence tending to contradict plaintiff, and are of the opinion that the cancellation of the relief sought that defendant had no authority to cancel the issue was justified.

As there was no cancellation of the issue defendant was caused by his obligation thereunder to pay that the judgment is proper and is affirmed.

AFFIRMED.

37 - 21687

WILLIAM W. PAISLEY and CHARLES H. WALKER, trading as Paisley & Walker, Defendants in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
C. N. MICHELS, Plaintiff in Error.	

193 I.A. 354

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On a judgment note made by defendant judgment by confession was entered for $425. Defendant entered his motion to stay execution and permit him to plead and defend; this motion was supported by affidavit. After hearing the court denied the motion. Defendant contends in this court that this should have been allowed because the affidavit shows a good and meritorious defense to the action on the note.

A motion to open a judgment entered by confession and to permit the defendant to plead should not be granted unless it satisfactorily appears to the court by affidavit that the defendant has a good defense upon the merits. "In an application of this character, to vacate a judgment and for leave to plead, affidavits filed in support of the motion are to be construed most strongly against the party making the application. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred." Chicago Fireproofing Co. v. Park Nat'l Bank, 145 Ill. 481. We do not think that the affidavit presented was sufficient to justify the court in granting defendant's motion. The matter set up as a defense is that plaintiffs

The matter set up as a defense would be plenty

while acting as agents of defendant falsely and fraudulently made certain representations, and that defendant, being in ignorance of the facts and relying upon the statements of the plaintiffs, was thereby induced to trade a piece of real estate for a note secured by trust deed upon other real estate, and some stock in a Five and Ten Cent store. It was said, first, that it was misrepresented that $2,000 had been paid upon a $14,000 incumbrance which was a prior lien upon the real estate covered by the trust deed securing a $6,000 note which defendant alleged he was induced to accept, and that certain interest installments had been paid upon this prior incumbrance. These representations might have been made as stated, but as it does not appear what the value of the security was it would make no difference as to the value of the $6,000 note received by defendant as to whether the first incumbrance was $10,000 or $14,000 or as to the amount of interest unpaid.

Another representation said to be fraudulent was that the stock in the Five and Ten Cent store had a market value in excess of $125 per share, "whereas in truth and in fact * * said shares of stock had no market value, but their value, if any, was entirely speculative and uncertain." Defendant did not allege that the stock was not worth $125 per share, nor that it could not be sold for that amount. ~~An allegation that it has no market value and that its value is "entirely speculative and uncertain" is not equivalent to an allegation that it was actually worth less than $125 per share. This allegation is insufficient as a statement of defense.~~

It was also alleged that there was a false representation that the $6,000 note and the trust deed securing it were "in legal form," whereas the note was not correctly

while acting on advice of defendant falsely and fraudulently made certain representations and that defendant, being in ignorance of the facts and relying upon the advice of the plaintiff, was thereby induced to trade a piece of real estate for a note secured by trust deed upon other real estate, and made account in a sum ten times more. It is alleged, first, that it was represented that $4,000 had been paid upon a $14,000 indebtedness which was a prior lien upon the real estate covered by the trust deed securing a $6,000 note which defendant alleged he was induced to accept, and that certain interest installments had been paid upon this prior indebtedness. These representations might have been made as stated, but as it does not appear that the value of the security was it would make no difference as to the value of the $6,000 note received in exchange for it. Neither the first indebtedness was $10,000 or $14,000 or as it the amount of interest accrued.

Another representation said to be fraudulent is that the stock in the five and ten cent store had a market value in excess of $125 per share, "whereas it truly had in fact a very small market of stock had no market value, but their value, if any, was entirely speculative and uncertain." Defendant does not allege that the stock was not worth $125 per share, nor that it could not be sold for that amount. It is alleged that it has no market value and that the value is "entirely speculative and uncertain" is not equivalent to an allegation that it was actually worth less than $125 per share. This allegation is insufficient as a matter of fraud.

It is also alleged that there was a false representation that the $6,000 note and the trust deed securing it were "in legal form." Perhaps the note was not correctly

described in the trust deed in that the note was made payable "November 1st after date," and the trust deed recites that it was "payable November 1, 1918, after date." This at most was merely a clerical error and does not impair the value of the note. Allegations in the affidavit that defendant is informed and believes that the note and trust deed might not be acceptable as security or collateral are unavailing.

Tested by the rule first above stated, defendants affidavit of a good and meritorious defense fails. The court below ruled correctly in overruling defendant's motion, and the judgment is affirmed.

AFFIRMED.

43 - 21723

CHARLES BRACHAS,
Defendant in Error,

vs.

SABATH AND WEISSKOPF
COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

198 I.A. 357

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff ~~brought suit~~ alleged that he had deposited $500 with defendant as security that Anton Lechowicz would turn over to defendant all collections made by him while employed by defendant, when, if done, the deposit was to be returned to plaintiff with five per cent. interest; ~~Plaintiff said~~ that subsequently Lechowicz left the employ of defendant, having turned over to it all moneys collected by him.

Defendant ~~by~~ in its affidavit of defense ~~said~~ that Lechowicz, employed as salesman and collector, made collections aggregating $190.75 which he failed to turn over to defendant, also that he is indebted to defendant for a balance on his merchandise and cash account, also for an item of expense incurred by defendant in verifying accounts among the trade, also for commissions advanced on sales where the accounts were not collected. The trial court struck from defendant's affidavit the last three items just described and entered judgment against defendant for the difference between the amount of plaintiff's claim, $529, and $190.75, the collections said not to have been turned in, which is $338.25. The court reserved jurisdiction of the balance of plaintiff's claim for future determination.

We hold that the judgment of the court on the items disallowed was right. The condition of the deposit of the $500 was stated in the written agreement of the parties to be to secure defendant "against any loss from dishonesty, misconduct or neglect of business" of Lechowicz. We are not of the opinion that the deposit was intended as security for any proper obligations of defendant's salesman in the usual course of business; the agreement does not reasonably bear that construction. The conditions permitting any deduction from the deposit when returned have reference to any indebtedness due defendant or loss sustained through dishonesty, neglect or misconduct of their salesman. The construction placed upon the agreement by the court meets with our approval.

Plaintiff has assigned cross-errors alleging that the court should have stricken that part of defendant's affidavit setting up amounts collected by Lechowicz but which he has failed to turn over to defendant. We hold that the deposit by plaintiff was intended under the agreement to apply to such collections. It may be that this failure can be explained, but standing alone and unexplained it implies a loss to defendant through dishonesty, misconduct or neglect, and therefore comes within the manifest intention of the agreement. It might also be noted that the averment in the affidavit of the failure to turn over collections, puts squarely in issue the allegation of plaintiff's statement of claim that Lechowicz, when he left the employ of defendant, had turned over to it all moneys collected by him. The cross-errors are without merit.

For the reason above indicated the judgment is affirmed.

AFFIRMED.

198/359

March 27, 1916

38 - 21811

CARRIE O. BRACHAM, PHILO A. OTIS and SEYMOUR MORRIS, Trustees under Otis Trust Agreement,
Defendants in Error,

vs.

HARRY H. LOBDELL, Trustee for Samuel Pitluk and Leo J. Lieberman, copartners doing business as La Salle Street Shoe Store,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 359

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit claiming to be entitled by reason of a lease to a pro rata share of moneys received by defendant, Lobdell, trustee, from the sale of assets of Samuel Pitluk and Leo J. Lieberman, co-partners. Upon trial the court instructed the jury to return a verdict against defendant for $1,754.22 upon which judgment was entered. Defendant seeks to have this reversed.

Pitluk and Lieberman were lessees of a store under a written lease from plaintiffs for a term beginning May 1, 1912, and ending April 30, 1917, at a monthly rental of $500 payable on the first day of each month during the term. The lessees also agreed to pay lessors for electric light used. In April, 1913, the lessees made an assignment of their property to Lobdell, as trustee, to be converted into money to be used in paying their creditors. The rent of the store due April 1, 1913, was not paid. On April 10th the trustee took possession of the premises and occupied until April 18th. Plaintiffs claim that under the terms of the lease, the lessees being in default not only as to rent but on other covenants, the entire rental for the balance of

...ased term became due and that plaintiffs are creditors ...itluk and Lieberman to that amount, that is, from April ..., 1913, to April 30, 1917, at $500 a month, which is $24,500, ...d to this should be added a bill of $332.10 for electric ...ght, making a total of $24,832.10; from this should be de-...cted the amount paid by the trustee while he was in possession, ...mely, $124.51, leaving a balance due plaintiffs of $24,707.59. ...sed upon the allowance of plaintiffs' claim for this amount, ...judgment was entered for their pro rata share of the moneys in the hands of the trustee.

It is first contended by defendant that the plain-tiffs were not parties to or beneficiaries of the assignment from Pitluk and Lieberman to Robdell, trustee, in that it was necessary for creditors wishing to participate in the benefits of the assigned estate to become parties to said agreement of ...gnment by signing their names thereto. It would be a ...fficient reply to say that this defense was not set up or ...laimed in the affidavit of defense filed in the Municipal ...ourt. Under the rules of that court, which are properly be-fore us, defendant will be heard only as to these matters of ...fense specifically set out in his affidavit. (See rules ...7 and 20.) The only issue made by the affidavit of defense ...s the amount due. But even if we should not apply the rules ...trictly, the evidence fails to sustain the contention that ...laintiffs did not sign the assignment agreement; rather the ...nference is otherwise. The document in question refers to ... parties "whose names are signed hereto, or to a copy ...reof, being creditors of said first parties hereto." The ...ument in evidence is signed by only one creditor. As the ...idence shows that eight other creditors shared in the dispo-...ition of the proceeds of the money in the hands of the trustee, presumption is raised that there must have been another copy

other copies of the agreement, one of which may have been signed by plaintiffs. There was no evidence that the copy in the record was the only copy of the agreement, and there was no evidence that plaintiffs had not signed another copy.

Objection is made to the form of the verdict found in the files. While this may have been informal it was substantially correct. In any event, the recital in the record as to the verdict returned is sufficient. In Chittenden v. Evans, 48 Ill. 52, it was said that it was not necessary for a jury to reduce their verdict to writing and that it might be reduced to proper form by the clerk under the direction of the court.

It was not error for the court to deny leave to defendant to amend his affidavit of defense. The motion was made several weeks after the conclusion of the trial. Furthermore, no amendment was presented to the court at the time the motion for leave to amend was made. [illegible] v. Elwood, 128 Ill. 397; Dilcher v. Schorik, 207 Ill. 526.

Under the provisions of the lease above referred to it was provided that if the lessees should [illegible] assignment of their property for the benefit of creditors, the lessors might terminate the lease and re-enter said premises and repossess themselves thereof, and it was further provided that in such event the lessees should at once pay to the lessors the sum of money equal to the entire amount of rent by this lease provided to be paid * * * as the liquidated damages of the lessors." The claim of plaintiffs for the entire amount of rental as liquidated damages was justified under the terms of the lease. Among the cases so holding are Central Invest. Co. v. Pellick, 267 Ill. 564; Smith v. Goodman, 149 Ill. 75; Gromaes v. St. Paul Trust Co., 147 Ill. 74; and Williams v. Short, App. Court No. 20581, not yet

No sufficient reason being brought to our attention disturbing the judgment it is affirmed.

AFFIRMED.

64 - 21814

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM De JOY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 361

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, charged with pandering, was found guilty and fined $300 and sentenced to be confined in the House of Correction for one year.

He seeks to have the judgment reversed, saying that the information is insufficient in that (a) it charges several offenses in the alternative, and (b) the place of the offense is not described. Defendant's attorney went to trial without objection to the information. The defects suggested do not go to the question of guilt or innocence. It is too late now to object. People v. Weber, 152 Ill. App. 104; People v. Perea, 181 id. 866. However, the information charges only one offense. "Inducing" and "persuading" are practically synonomous.

The place of the offense is sufficiently described; it is charged that it happened in the city of Chicago, at No. 671 Milwaukee avenue. (See opinion in People v. Leon, No. 21743, this day filed; also People v. Bennett, 185 Ill. App. 316.)

Was there a jury waiver in writing? We hold that there was. The record recites the execution of such a waiver; the record reports verity. Richardson v. Loeff, 253 Ill. 526. And the waiver is in the record. That the de-

1921A.361

[illegible]

[illegible] on [illegible] of [illegible].

[illegible], counsel [illegible], [illegible] found guilty and fined [illegible] and sentenced to be confined in the house of correction for one year.

[illegible] to have the judgment reversed, [illegible] that the information is insufficient in that (a) it charges several offenses in the alternative, and (b) the time of the offense is not described. Defendant's attorney sent to trial without objection to the information. The defects suggested do not go to the question of guilt or innocence. It is too late now to object. People v. Power, 124 Ill. App. 344; People v. Peters, 141 Ill. 288. However, the information charges only one offense. "Stealing" and "permanently" are practically synonymous.

The place of the offense is sufficiently described; it is charged that it happened in the city of Chicago, on [illegible], 2711 Wentworth avenue. (See citation in People v. Leon, 20. 21248, this day filed; also People v. Kennedy, 345 Ill. 490; 316.)

The there a jury waiver in writing; as said [illegible] was. The record contains the execution of such a waiver; the record imports verity. Kimbrough v. Ingall, 103 Ill. 108. Not the waiver of it for trial. That the de-

fendant signed by making his mark does not impair its integrity.

The evidence has not been preserved. The errors alleged against the statutory record are without merit. The judgment is affirmed.

AFFIRMED.

Tassoni aligned by sending his work does not impair its immortality.

The evidence has not been preserved. The various writers against the statutory records are without merit. The judgment is affirmed.

AFFIRMED.

85 - 21946

JOSEPH FRANKEL et al.,
Appellees,

vs.

SOL C. SALZENSTEIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

198 I.A. 363

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs employed defendant as a traveling salesman. They bring suit claiming that their advances to him exceed the amount due him on commissions and that under the contract of employment he is obligated to repay the difference. Upon trial by the court judgment against the defendant was entered for $3685.74.

The contract commenced to run March 9, 1909, and ended February 28, 1910. It was claimed on behalf of defendant that plaintiffs wrongfully discharged him before the end of the contract, but ~~we are not persuaded from the evidence that this was the fact.~~ The trial court properly could find that in December, 1909, or January, 1910, by mutual agreement the contract was terminated. There was ~~The greater weight of the~~ evidence ~~is~~ to the effect that at a meeting between defendant and plaintiffs in December, 1909, or possibly January, 1910, defendant proposed "to quit," to which plaintiffs agreed. ~~No point can be made based upon the assumption of a wrongful discharge.~~ There being no wrongful discharge and no refusal by plaintiffs "to go on with the contract," they are not in default, hence are not barred from seeking to enforce the terms of the contract against defendant.

Is there competent evidence upon which to base the judgment? It is alleged in the Statement of Claim that

JOHN MARKS et al.,
Appellees,

vs.

[illegible] E. BALDWIN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

193 I.A. 303

MR. PRESIDING JUSTICE MCMORRAY
DELIVERED THE OPINION OF THE COURT.

Plaintiffs employed defendant as a traveling salesman. They bring suit claiming that their advances to him exceed the amount due him on commissions and that under the contract of employment he is obligated to repay the difference. Upon trial by the court judgment against the defendant was entered for $600.74.

The contract commenced to run March 9, 1925, and ended February 28, 1926. It is claimed on behalf of defendant that that plaintiffs wrongfully discharged him before the end of the contract. We are not persuaded from the evidence that this was the fact. The trial court properly could find that in December, 1925, or January, 1926, by mutual agreement the contract was terminated. [illegible] evidence tends to the effect that at a meeting between defendant and plaintiffs in December, 1925, or possibly January, 1926, defendant proposed "to quit," to which plaintiffs agreed. [illegible] made upon the ambition of a young fellow. There being no wrongful discharge and no refusal by plaintiffs "to go on with the contract," they are not in default, hence are not barred from seeking to enforce the terms of the contract against defendant.

Is there competent evidence upon which to base the judgment? It is alleged in the statement of claim that

the advances to defendant amounted to $4464.50. The affidavit of defense admits this. The Statement of Claim further says that orders obtained by defendant upon which he is entitled to commission amounted to $21,934.46. Attached to the Statement is a schedule giving the names and amounts of each order, and it was alleged that these were all the orders upon which defendant was entitled to commission. If defendant wished to question the correctness of this statement he should have specifically done so in his affidavit of defense, as required by the Municipal Court rules, which are in accord, or, as provided by rule 20, he could upon motion be excused by the court from specifically answering any particular allegation, upon showing to the court that he could not answer it because he did not have the necessary knowledge as to the fact alleged, or for other good cause. Defendant did not avail himself of the provisions of the rule. Upon the trial no attempt was made by him to show that the amount of orders was not correct. The books of the company, upon his request, could readily have been brought into court. We are of the opinion that the correctness of plaintiffs' statement of the account was admitted; hence it was unnecessary to make detailed proof thereof.

The points urged for a reversal are not convincing, and the judgment is affirmed.

AFFIRMED.

the expenses to defendant amounted to $4664.61. The affidavits of defense admit this. The statement of claim further says that orders obtained by defendant upon which he is entitled to commission amounted to $51,984.46. Attached to the statement is a schedule giving the names and amounts of such orders, and it was alleged that these were all the orders upon which defendant was entitled to commission. If defendant wished to question the correctness of this statement he should have specifically done so in his affidavit of defence, as required by the Municipal Court rules, which are in force, or, as provided by rule 30, he could upon motion be excused of the need for specifically admitting or traversing allegations. Upon showing to the court that, he could not answer it because he did not have the necessary knowledge as to the fact alleged, or for other good cause. Defendant did not avail himself of the provisions of the rule. Upon the trial no attempt was made by him to show that the amount of orders was not correct. The books of the company, upon his request, could readily have been brought into court. In the opinion of the court the correctness of plaintiff's claim as to the account was admitted; hence it was unnecessary to make detailed proof thereof.

The grounds urged for a reversal are not convincing, and the judgment is affirmed.

Affirmed.

36 - 21684

F. A. JOHNSON, Plaintiff in Error, vs. PAUL PEYRIRSEN, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 367

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had a contract to do certain work in the erection of a building for defendant and after all the work had been done received an architect's certificate for $671, the balance of the contract price. By the terms of the contract plaintiff agreed to complete all the work he had undertaken to do on or prior to August 25, 1914. As a matter of fact this he failed as to one store to do. The work of plaintiff on this store was completed on September 15, 1914, a delay of twenty-one days. Defendant claimed that he had rented this store to a tenant who had paid $5 on account to bind the bargain, at a rental of $35 a month, which was the reasonable rental value of the store.

~~The testimony of~~ Defendant testified ~~established~~ the fact that he never saw this prospective tenant again and was unable to find him. The store remained unrented until May 15, 1915, and defendant claimed that the loss of the prospective tenant was due to the store not being ready for occupancy by such tenant at the time plaintiff had contracted to complete his work. Defendant claimed that the measure of his damages was the rental value of the store during the time it remained unrented, and the trial judge, heeding defendant's contention, gave judgment for $404.90, the amount of the architect's certificate, less the rental value of the store at the rate of

Finnsiff and a contract to do certain work in the erection of a building for defendant and after all the work had been done received an architect's certificate for $[illegible], the balance of the contract price. By the terms of the contract finnsiff agreed to comply with all the orders and requirements in do so or prior to August 20, 1913. In a matter of fact this he failed so at one after to do. The work of finnsiff on this store was completed on September 18, 1913, a delay of twenty-one days. Defendant claimed that he had rented this store to a tenant who had [illegible] on account to bind the bargain, at a rental of [illegible] a month, which was the reasonable rental value of the store.

The testimony of plaintiff established the fact that he never was able prospective tenant which had was unable to find them. The store remained unrented until July 1, 1913, and defendant claimed that the loss of the prospective tenant was due to the store not being ready for occupancy by such tenant at the time finnsiff was contracted to complete his work. Defendant claims that the measure of its damages was the rental value of the store during the time it remained unrented, and the trial judge, treating defendant's contention, gave judgment for $[illegible], the amount of the architect's certificate, less the rental value of the store at the rate of

$35 a month from August 25, 1914, when plaintiff's work should have been completed, to May 15, 1915, when defendant succeeded in securing a tenant. Plaintiff ~~seeks a review of this judgment by this court and~~ asks for a reversal and a judgment in his favor for the amount of the architect's certificate with interest, less the rental value of the store for twenty-one days, defendant's damages assessable for non-completion within the contract time.

Plaintiff contends that in cases like the one at bar, where a contractor fails to complete a building within the contract time, the measure of damages is the rental value of the premises from the time when such premises should have been completed under the contract until the time when they were actually completed.

There is no authority for assuming that defendant suffered any damage by the loss of the prospective tenant who proved elusive, and nothing in the record justifying a conclusion that defendant's prospective tenant disappeared leaving $5 in his hands because the store was not completed for twenty-one days after it should have been under the contract.

It is the law that where a defendant claims damages by reason of delay in the performance of a building contract, whereby such defendant has been deprived of the use of the building, he may recoup the same in a suit against him by the contractor and that the measure of damages is the fair rental value of such portion of the premises during the period of delay. Galbreath v. Chicago Architectural Works, 50 Ill. App. 248; Buell v. Cottingham, 72 Ill. 161.

It is not disputed that $35 a month is a fair rental value for the store, which was not completed by plain-

[illegible] a month from August 20, 1914, when plaintiff's work should have been completed, to July 19, 1915, when defendant succeeded in securing a vendee. Plaintiff seeks a review of this judgment by this court and asks for a reversal and a judgment in his favor for the amount of the architect's certificate or in the alternat, less the actual value of the store for twenty-one days, defendant's damages measurable for non-completion within the contract time.

Plaintiff contends that in cases like his one at bar, where a contractor fails to complete a building within the contract time, the measure of damages is the rental value of the premises from the time when such premises should have been completed under the contract until the time when they were actually completed.

There is no authority for assuming that defendant suffered any damage by the loss of the prospective tenant who proved elusive, and nothing in the record justifies a conclusion that defendant's prospective tenant disappointed leaving it on its hands because the store was not completed for twenty-one days after it should have been under the contract.

It is the law that where a defendant claims mitigation by reason of delay in the performance of a building contract, merely such defendant has been deprived of the use of the building, he may recover the same in a suit against him by the contractor and that the measure of damages is the fair rental value of such portion of the premises during the period of delay. Gainsville v. Dickson Architectural works, 30 Ill. App. 449; Hoell v. Zettlemoyer, 74 Ill. 161.

It is not disputed that 120 a month is a fair rental value for the store, which was not completed by plain-

tiff until twenty-one days after the time limited by the contract. The rental value for this twenty-one days at $35 a month amounts to $24.36, for which amount defendant is entitled to a credit. Deducting this sum from the amount of the architect's certificate, $671, leaves a balance of $646.64, due plaintiff January 16, 1915, for which sum, with interest at the rate of 5 per cent. per annum from the last date, plaintiff should have had judgment. Not having so recovered in the trial court, plaintiff is entitled to recover in this court $646.64 with interest from January 16, 1914, to the time of filing this opinion, which interest is $70.94.

The judgment of the Municipal Court is reversed and judgment entered here in favor of plaintiff and against defendant for the sum of $717.58.

REVERSED AND JUDGMENT HERE FOR $717.58.

FOR PLAINTIFF.

296 - 21692

WALTER E. McKENNA,
Plaintiff in Error,

vs.

SOUTH PARK COMMISSIONERS,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

198 I.A. 369

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Walter E. McKenna was a patrolman in the employ of the Board of South Park Commissioners. McKenna was what is known as a "Civil Service employe." He received his appointment May 17, 1911. On August 17, 1914, the Civil Service Board of the South Park Commissioners preferred charges against McKenna and appointed H. C. Carbaugh and R. J. Furber, Jr., as a trial board to try McKenna. McKenna was charged with conspiring with officer Sullivan on August 8, 1914, to demand from Walter H. Wulser, who had been arrested, $30. Wulser paid that sum and McKenna released him. On this charge McKenna was tried, found guilty and discharged from his office. McKenna brought this mandamus proceeding to have the South Park Commissioners ordered to forthwith place his name upon the roster of patrolmen, so that he might perform the duties of and keep that office.

It appears from McKenna's petition that a partial hearing of his case was had in September, 1914, before Carbaugh and Furber, the trial board, and that owing to the sickness of McKenna the further hearing was postponed until February 15, 1915, at which time McKenna personally appeared and was heard in his own defense. Furber did not sit upon the trial board and the hearing of McKenna in his own defense was had before Carbaugh, who alone sat as the trial board.

The right to an award of the writ of mandamus is

predicated upon the contention that Furber was absent at the hearing on February 18, 1915, and that the report on McKenna's case, which was adopted by the Civil Service Board, was made by Carbaugh only, and it is contended that Carbaugh had no jurisdiction to hear alone the charges and report his findings thereon. To McKenna's petition a general demurrer was interposed and sustained and the petition dismissed, and McKenna prosecutes this writ of error, seeking a reversal.

Section 12 of the Park Civil Service Act provides that "charges shall be investigated by or before the Civil Service Board or by or before some officer or officers appointed by the Board to conduct such investigation. * * " The objection that Carbaugh could not act alone as a trial board is made in this Court for the first time. The record does not disclose that McKenna was deprived of any legal right, and it is not denied that the proceedings were in every particular, excepting the one complained of, regular. As the Park Civil Service Board approved of Carbaugh as its trial officer, (it will be assumed from that fact that he was authorized to act as the trial board in McKenna's case). As under Section 12, supra, it is competent for one person to act as a trial board, (it will be assumed that Carbaugh was acting as such under authority of the Civil Service Board, who not only approved his report but acted upon the recommendation contained in it.) That he was not so acting is nowhere averred in McKenna's petition. Neither is it averred that Carbaugh had not been authorized by the Civil Service Board to act as sole trial officer. The Civil Service Board had the power to change the personnel of the board at any time, and in the absence of any averment to the contrary it will be assumed that it authorized Carbaugh to proceed as sole trial officer. As said by the writer of this opinion in People v. Lowell,

127 Ill. App. 614 - "However, if there was room for any doubt as to the legality of the appointment of the persons constituting the trial board, the ratification of the action of the board by the commission in approving and adopting its report and findings was a sufficient corrective;" and as further said in the Powell case, supra, "He appeared at the trial in person and was heard in his own defense, and in this regard all the requirements of the statute were fulfilled. He made no protest or objection to the jurisdiction of the trial board either before that board or to the commission. The jurisdictional question cannot be raised on this appeal for the first time." Joyce v. City of Chicago, 216 Ill. 466, is a supporting authority.

City of Chicago v. The People, 210 Ill. 84, urged by counsel for plaintiff in error as controlling authority, is in no wise applicable, because in that case the trial of Gray, the relator, was adjudged to be irregular, as the trial board was not constituted as required by the rules of the Civil Service Commission, and Gray was also deprived of the opportunity to be heard in his own defense - elements which are not present in McKenna's case.

If it were necessary for us to decide this case upon its merits, which it is not, we should be impelled to find that McKenna was convicted of a heinous offense, dishonest in itself and destructive of the discipline of the police force, of which he was a member.

The proceeding against McKenna, which resulted in his discharge from the service of defendant in error, being regular and conforming to the Civil Service rules applicable to his case, the judgment of the Superior Court is affirmed.

AFFIRMED.

127 III. App. 68 - However, if there was room for any doubt as to the legality of the appointment of the trial court, examining the trial board, the testimonies of the members of the board by the commission in evidence, and hearing its report and findings was a sufficient corrective; and as further said in the Israil case, supra, "The appointed at the trial by person and was heard in his own defense, and in this regard all the requirements of due process were fulfilled. No undue or improper or objection to the jurisdiction of the trial board either before that board or to the commission. The jurisdictional question cannot be raised on this appeal for the first time." Jones v. City of Chicago. 168 Ill. 148, is a supporting authority.

City of Chicago v. The People, 32 Ill. App. 148.

Urged by counsel for plaintiff in error as controlling, unauthority, is to wise applicable, because in that case the trial of case, the relator, was entitled to be discharged, as the trial board had not constituted as required by the rules of the Civil Service Commission, and they had failed of the requirement to be found in the set letters - discharge which are not present in defendant's case.

If it were necessary, for us to decide this case upon its merits, which it is not, we should be inclined to find that duress was convicted of a serious offense, discovered in fraud and deceitfulness of the discipline of the police force; of which he was a member.

The proceeding against the case, which results in his discharge from the service of defendant in error, being regular and conforming to the Civil Service rules applicable to his case, the judgment of the superior court is affirmed.

Affirmed.

42 - 21720

A. B. HARTMAN,
Defendant in Error,

vs.

CITY OF CHICAGO, a municipal corporation, and CHARLES [illegible], Commissioner of Buildings of the City of Chicago,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

198 I.A. 372

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The order for a writ of mandamus in this case must be reversed for error in procedure, and as the case must be again heard in conformity with the theory indicated in this opinion, the merits of the cause will be neither determined nor discussed.

Defendant in error filed his petition for a writ of mandamus seeking to compel the plaintiffs in error to approve plans for a certain building and to issue a permit authorizing its erection. According to these plans, metal covering was to be used for the walls and ceilings of the building, without any plaster on the inner side between such metal and the wall or ceiling, which was violative of the provisions of Section 605 of the 1911 Chicago code. The respondents interposed to this petition a general demurrer which was not disposed of. The finding part of the final order and judgment ~~involved in this writ of error is~~ was as follows:

"This cause coming on to be heard upon the demurrer of respondents to the petition of petitioner and after arguments of counsel and being fully advised in the premises, the court doth find that section 605 of the building ordinances of the City of Chicago as amended and passed and in force on and after March 9, 1914, is unreasonable and void as to each and all of the provisions thereof requiring lathing and plaster above and behind metal covered ceilings and walls in buildings erected in said city."

A. S. DUNLAP,
Defendant in error,

vs.

CITY OF CHICAGO, a municipal corporation, and CHARLES SCHUTTLER, Commissioner of Buildings for the City of Chicago,
Plaintiff in error.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

The order for a writ of mandamus in this case must be reversed for error in procedure, and as the case must be again heard in conformity with the theory indicated in this opinion, the merits of the cause will be neither determined nor discussed.

Defendant in error filed his petition for a writ of mandamus seeking to compel the plaintiffs in error to approve plans for a certain building and to issue a permit authorizing its erection. According to those plans, metal covering was to be used for the walls and ceilings of the building, without any plaster on the inner side between such metal and the wall or ceiling, which was violative of the provisions of section 663 of the 1911 Chicago code. The respondents interposed to this petition a general demurrer. The trial court of the first order sustained the demurrer and in this writ of error the question is as follows:

"This cause coming on to be heard upon the demurrer of respondents to the petition of petitioner and after arguments of counsel and being fully advised in the premises, the court doth find that section 663 of the building ordinances of the city of Chicago as amended and passed and in force on and after March 9, 1911, is unconstitutional and void as to such one and all of the provisions thereof requiring lathing and plaster above and behind metal covered ceilings and walls in buildings erected in said city."

The order continued by awarding a mandamus against the City of Chicago and its Building Commissioner, as prayed in Hartman's petition.

It will be noticed that the demurrer is nowhere disposed of. The Court could not enter a valid final order without disposing of the demurrer. After the disposition of the demurrer respondents had their election either to abide by the demurrer or to answer the petition. If respondent shall elect to answer the petition, the question of the unreasonableness or reasonableness of the ordinance may become a question of fact to be determined as other questions of fact. This being an ordinance passed presumably in the exercise of the police power, it will be assumed, until the contrary is made to appear, that such ordinance is reasonable and the determination of the Council on that subject held to be conclusive. Languel v. City, 197 Ill. 20.

The judgment of the Circuit Court is reversed and the cause remanded with directions to the Circuit Court to proceed to hear and dispose of the demurrer and thereafter to proceed as in like cases.

REVERSED AND REMANDED.

The order continued by awarding a mandamus against the city of Chicago and the building Commissioner, as prayed in Hartman's petition.

It will be noticed that the demurrer is neither disposed of. The Court could not enter a valid final order without disposing of the demurrer. After the overruling of the demurrer respondents had their election either to abide by the demurrer or to answer the petition. If the former, shall plead to answer his petition, the question of the unreasonableness or reasonableness of the ordinance may become a question of law, to be determined on other questions of law. This being an ordinance passed presumedly in the exercise of the police power, it will be assumed, until the contrary is made to appear, that such ordinance is reasonable and the determination of the Council on that matter must be conclusive. Lawrence v. City, 197 Ill. 80.

The judgment of the Circuit Court is reversed and the cause remanded with direction to the Circuit Court to proceed to hear the evidence of the demurrer and thereafter to proceed as in like cases.

44 - 21726

I. LURYA LUMBER CO., a corporation,
Defendant in Error,

vs.

PHILIP GOLDBERG,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 374

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action for a mechanic's lien in which plaintiff recovered a money judgment for $200 against defendant on the finding of the court. The claim for a mechanic's lien was not passed upon, and defendant seeks this review.

It appears Defendant had a contract with L. Harris, a general contractor, for the erection of a building, in which contract all liens and claims or right of lien under the Mechanic's Lien Act for labor or materials furnished, etc., were waived.

One Lazar had a contract with Harris for carpenter work to the amount of $2100. Plaintiff furnished lumber to Lazar, which was used in defendant's building under the Harris contract. The Beltman Bond and Mortgage Company made a building loan on Goldberg's property and plaintiff executed and delivered a waiver and release of any and all liens and claims or right to a lien on Goldberg's premises on account of any material it had furnished to Lazar, which waiver and release it delivered to the Mortgage Company. The Court awarded the judgment on the theory that Goldberg had testified in a prior suit that he had reserved out of the money due and to become due to Lazar, $200, which he was -

I. SHAWA LUMBER CO., a
corporation,
Defendant in Error,

vs.

[illegible]
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 374

MR. JUSTICE SCHAEF DELIVERED THE OPINION OF THE COURT.

This is an action for a mechanic's lien. Plaintiff recovered a money judgment for $[illegible] against defendant on the finding of the court. The claim for a mechanic's lien was not passed upon, and defendant seeks this review.

It appears defendant had a contract with [illegible] Harris, a general contractor, for the erection of a building. In consideration of [illegible] contract all liens and claims or rights of lien under the Mechanic's Lien Act for labor or materials furnished, etc., were waived.

One Lamer had a contract with Harris for carpenter work to the amount of $2100. Plaintiff furnished lumber to Lamer, which was used in defendant's building under the Harris contract. The Hallman Sand and Lumber Company made a similar lien on Goldberg's property and plaintiff executed and delivered a waiver and release of any and all liens and claim or right to a lien on Goldberg's premises on account of any material it had furnished to Lamer, which waiver and release it delivered to the Lumber Company. The Court sustained the judgment on the theory that Goldberg had satisfied in a manner such that he was released out of the money due and to become due to Lamer, $600, which he was

holding for the plaintiff.

We have not been favored with either brief or argument on the part of plaintiff.

We think it clear that no claim for a lien can be maintained by plaintiff, as under the contract with Harris the right to a mechanic's lien was waived. This part of the contract is binding upon all persons furnishing labor or materials under any sub-contract with Harris, the general contractor. Von Platen v. Winterbotham, 203 Ill. 198.

Plaintiff had no lien and it did not try this case upon that theory. We think plaintiff's rights must be admeasured within its complaint and that therefore the money judgment was erroneous, lacking a finding that plaintiff had established its right to a lien.

But, proceeding further, we will dispose of the claim made by plaintiff upon the trial that defendant held out from the contract price $200, which was to be applied toward plaintiff's claim for lumber furnished Lazar. This claim was refuted by the testimony of defendant, Harris, the general contractor, and Frank Meitman, who represented the Mortgage Company, so that if the law would tolerate plaintiff's alleging one cause of action and proving another, which it will not, still plaintiff fails.

The judgment of the Municipal Court is reversed, and as plaintiff has no cause of action against defendant enforceable in a court of law, the cause will not be remanded.

REVERSED.

(nothing for the plaintiff)

We have not been favored with either brief or argument on the part of plaintiff.

We think it clear that no claim for a lien can be maintained by plaintiff, as under the contract with Hartzie the right to a mechanic's lien was waived. This part of the contract is binding upon all persons furnishing materials or material under any sub-contract with Hartzie, the general contractor. Von Platen v. Winterbotham, 82 Ill. 198.

Plaintiff had no lien and it did not try this case upon that theory. We think plaintiff's rights must be measured within its contract and that therefore the money judgment was erroneous. Leaving a finding that plaintiff had established its right to a lien.

But, proceeding further, we will dispose of the claim made by plaintiff upon the trial that defendant held out from the contract price $400, which was to be applied against plaintiff's claim for lumber furnished [illegible]. This claim is refused by the testimony of defendant, Hartzie, the general contractor, and Frank Heiman, who represented the Hartzie Company, so that if the law would tolerate plaintiff's alleging one cause of action and proving another, which it will not, still plaintiff fails.

The judgment of the Municipal Court is reversed, and as plaintiff has no cause of action against defendant enforceable in a court of law, the cause will not be remanded.

46 - 21743

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

EDWARD LEON,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

193 I.A. 376

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant brings this writ of error to have us review a judgment convicting him of being an inmate of a house of prostitution, etc., contrary to sec. 57, A. 1, chap. 38, R. S. A jury being waived, the trial judge after hearing the evidence found defendant guilty of the criminal offense of being an inmate of a house of ill fame kept for the purpose of fornication and fixed his punishment at 30 days imprisonment in the House of Correction, the payment of a fine of $100 and costs of the prosecution, taxed at $8.50, in default of payment of which defendant was to be detained in the House of Correction until the fine and costs are worked out at the rate of $1.50 per day, or until discharged by due process of law as by statute provided.

Only the statutory record ~~is before us~~ was brought before the Appellate Court. The errors complained of ~~are~~ were said to be encompassed within this record. ~~It will therefore be assumed that the evidence was sufficient to sustain the conviction and judgment if the information warranted the conviction and the judgment is a lawful judgment.~~ The prosecution ~~is~~ was by information. The statute which defendant ~~is~~ was charged with offending went into force July 1, 1915. Defendant contended that the information ~~charges~~ stated no offense, ~~in the charge.~~ ~~It is true that there is some crudeness in the way in which that document is drawn. These are the words in which the infirmity argued is said to exist:~~ that defendant

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in error,

vs.

EDWARD LUCAS,
Plaintiff in error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MCINES DELIVERED THE OPINION OF THE COURT.

Defendant brings this writ of error to have us review a judgment convicting him of being an inmate of a house of prostitution, etc., contrary to sec. 27, R. S. 1929, ch. 38, R. S. A jury being waived, the trial judge after hearing the evidence found defendant guilty of the criminal offense of being an inmate of a house of ill fame kept for the purpose of fornication and fined him punishment at 30 days imprisonment in the house of correction, the payment of a fine of $100 and costs of the prosecution, based on R.S. in defendant's of which defendant was to be detained in the house of correction until the fine and costs are worked out at the rate of $1.50 per day, or until discharged by due process of law as by statute provided.

Only the statutory record is before us. The error complained of was said to be encompassed within this record and it will therefore be assumed that the evidence was adequate to sustain the conviction and judgment of the intermediate court. The question and the judgment is a factual one exclusively for determination by the trial court. The statute which defendant is charged with offending was into force July 1, 1929. Defendant contends that the information charges no offense. It is true that there is some crossness in the wording of which this complaint is based. There are not little in which the relevant element is well in mind relevant

"on the 7th day of August, A. D. 1915, at the City of Chicago aforesaid, at, to-wit: 1259 W. Madison street, was then and there an inmate of a house of ill fame or assignation or prostitution or lewdness, contrary to the statute." The contention is that the charges being in the disjunctive are insufficient to charge any offense of which defendant can be convicted, and that the venue in the caption of the information is no part of the information. Defendant voluntarily went to trial upon the information without objecting to its sufficiency or moving to quash. The objection made on review for the first time is without force. The trial court committdd no error in ruling upon the sufficiency of the information, because defendant did not challenge in any way its sufficiency or call for the ruling of the court thereon. Besides we are inclined to the opinion that the offenses charged in the disjunctive are in legal effect and intendment but one. Either one, less than all, may be disregarded, and an offense of a similar character against the statute remains. A house of assignation where prostitution is indulged in is a house of ill fame and prostitution is lewdness. We regard Blemer v. The People, 76 Ill. 265, as authority supporting this dicta and as in no way contrary to it. The venue is a part of the information and the charge that the offense was committed at the "city of Chicago aforesaid", etc., by construction refers to the venue as laid in the caption of the information. Again, defendant claims that it is not charged that his act of being in the house of ill fame was unlawful. However, the charge was in the language of the statute and the statute made the act charged unlawful. That was all sufficient. Defendant says he was not an "inmate" within the meaning of the statute. In the condition of this record the evidence may have established, for aught we may know to the contrary,

"on the 7th day of August, A. D. 1913, at the City of Chicago aforesaid, to-wit: Lake s. Dearborn street, was then and there an inmate of a house of ill fame or assignation or prostitution or lewdness, contrary to the statute." The contention is that the charges being in the disjunctive are insufficient to charge any offense of which defendant can be convicted, and that the venue in the position of the information is no part of the information. Defendant voluntarily went to trial upon the information without objecting to its sufficiency or moving to quash. The objection made on review for the first time is without force. The trial court committed no error in ruling upon the sufficiency of the information, because defendant did not challenge in any way its sufficiency or call for the ruling of the court thereon. Besides we are inclined to the opinion that the offenses charged in the disjunctive are in legal effect and intendment but one. Either one, less than all, may be disregarded, and an offense of a similar character against the statute remains. A house of assignation were prostitution is included in is a house or ill fame and prostitution is lewdness. In Regina v. Jarvis, 25 Ill. App. 274, we similarly construed the statute and as in no sense contrary to it. The venue is a part of the information and the charge that the offense was committed at the "city of Chicago aforesaid", etc., by construction refers to the venue as laid in the caption of the information. Again, defendant claims that it is not charged that his act of being in the house of ill fame was unlawful. However, the charge was in the language of the statute and the statute made the act charged unlawful. That was all sufficient. Defendant says he was not an "inmate" within the meaning of the statute. In the condition of this record the evidence may have established, for aught we may know to the contrary,

that he was permanently resident in the house of ill fame in which he was arrested, and all intendments must be indulged necessary to sustain the charge in the information.

Defendant challenges the constitutionality of the statute for the violation of which he was convicted. Whether this challenge be well taken or not is none of our concern. This Court is not vested with jurisdiction to determine constitutional questions. If the constitutionality of the statute was involved, the review should be prosecuted in the Supreme Court. In this Court the presumption obtains that the statute does not offend any constitutional provision. Barnes v. Drainage Comm'rs, 221 Ill. 627. Seeking a review by this Court waived any constitutional question which might otherwise be raised.

Defendant contends that there is no statute authorizing imprisonment for the non-payment of "fines" or "costs." In this he is in error. Sec. 452, chap. 38, Hurd's R. S., provides: "When a fine is inflicted the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law." Sec. 448 provides that where jail sentences may be imposed upon defendants, the court may send the culprit to the house of correction or other place provided by the county or city authorities. The remaining part of the sentence - that the fine and costs be "worked out" at the rate of $1.50 per day - is in the interest of the convicted person as it minimizes his term of imprisonment.

The objection to the jurisdiction of the trial Judge to preside at the trial of defendant is not well taken.

There is no reversible error in the record before us and the judgment of the Municipal Court is affirmed.

AFFIRMED.

that he was permanently resident in the house of ill fame in which he was arrested, and all inferences must be inferred necessary to sustain the charge in the information.

Defendant challenges the constitutionality of the statute for the violation of which he was convicted. Whether this challenge be well taken or not is none of our concern. This court is not vested with jurisdiction to determine constitutional questions. If the constitutionality of the statute was involved, the review should be prosecuted in the Supreme Court. In this court the presumption obtains that the statute does not offend any constitutional provision. Petrea v. Lexington Com'ln, 241 Ill. 627. Seeking a review by this court waived any constitutional question which might otherwise be raised.

Defendant contends that there is no statute authorizing imprisonment for the non-payment of "fines" or "costs." In this he is in error. Sec. 424, Crim. Code, Ill. Ann'd S., provides: "When a fine is inflicted the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law." Sec. 425 provides that these jail sentences may be imposed upon defendants. The court may cast the subpoena to the costs of prosecution or other place provided by the statute or city ordinance. The remaining part of the sentence, that the fine and costs be "worked out" at the rate of $1.00 per day is to the interest of the defendant, because he is obligated to serve of imprisonment.

The objection to the jurisdiction of the trial court to preside at the trial of defendant is not well taken. There is no reversible error in the record before us and the judgment of the municipal Court is affirmed.

47 - 21746

EDWIN D. WEARY,
Defendant in Error,

vs.

THE WINTON MOTOR CAR COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 379

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an automobile collision case in which the gas car of defendant struck the electric car of plaintiff while the latter was imprudently turning his car around from the north to the south in about the middle of the block between Harrison and Congress streets. The case was tried before the court, who found in favor of plaintiff, assessing his damages at $838.30 and for that amount gave judgment. Defendant seeks our review and argues for reversal errors committed by the trial Judge in his rulings upon the evidence.

The rulings of the court are contradictory and in many essential particulars erroneous. One of the material questions before the court for solution was the amount of damage to plaintiff's car resulting from its collision with the car of defendant. Defendant contended that just prior to the instant collision plaintiff's car had been in collision with a horse drawn truck, but the court would not permit counsel for defendant to ask questions on cross-examination concerning such former collision. Neither would the court allow any questions to be put to the witness of plaintiff testifying as to the amount of damage done to the car in the prior collision with the horse drawn truck. This witness did not see plaintiff's car until after both collisions, and his

estimate of the damage to plaintiff's car did not take into consideration the former collision. Furthermore, counsel for plaintiff had the effrontery to ask the court to discipline counsel for defendant for his temerity in asking questions concerning the former collision. Again, plaintiff was allowed to prove by his son that Officer Golden had stated to him that his father was without fault in the collision; yet the Court refused to allow counsel for defendant to ask this officer whether plaintiff had not admitted to him that his car had a few minutes prior to the collision with defendant's car been in collision with a horse drawn truck, and that as a result of such collision his car had been damaged. In all these matters the trial Judge erred.

The son's testimony was clearly hearsay. Rafter v. Chicago City Ry. Co., 139 Ill. App. 81. Proposition no. 3, held as law by the trial Judge, was erroneous. It held that the question of plaintiff's being in the exercise of due care and caution, etc., was one of law, while on the contrary such question is one of fact.

We do not intend to pass upon the weight of the evidence because that is not before us on this review, but for the errors indicated the judgment of the Municipal Court is reversed and the cause is remanded for a new trial, when the evidence excluded, if again proffered, must be admitted.

REVERSED AND REMANDED.

81- 21920

PEOPLE OF THE STATE OF ILLINOIS ex rel. MARY BELASCO, Appellee, vs. HOWARD LANGFORD, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 385

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

~~This is a prosecution~~ for bastardy. Defendant waived a trial by jury and the case was heard by the trial Judge, who found the defendant to be the putative father of a bastard child born to the relatrix. ~~A money judgment~~ in the usual form was entered and defendant prosecutes this ~~appeal.~~ The errors assigned and argued are that the finding and judgment are contrary to the weight of the evidence, that there ~~is~~ were no proof that relatrix was unmarried at the time of conception, and that relatrix and defendant were non-residents of this State.

~~While the testimony abstracted does not disclose that~~ Relatrix testified that she was an unmarried woman, ~~on turning to the record we find she so testified.~~ ~~No challenge of this fact or motion for a finding in defendant's favor on any such grounds was made~~ in the trial court; the contention is therefore unavailing on appeal. People ex rel. Griffin, 142 Ill. App. 588, is not in point here. Griffin preserved the question for review by tendering a suitable proposition of law which the court refused to hold as the law. In the Griffin case it was admitted that the relatrix was a married woman at the time of conception. As there is no evidence in this case that relatrix was not an unmarried woman at the time she conceived the child, defendant stands convicted of being the father. In the absence

of proof or challenge to the contrary it will be assumed that relatrix was unmarried at the time of conception. Furthermore relatrix testified that defendant was the only man she ever carnally knew, and no attempt was made to prove otherwise.

The trial Judge proceeded with care and circumspection in dealing with the facts. Not being satisfied with the testimony of relatrix in affirmance and of defendant in denial of the charge, the learned trial Judge continued the hearing for further proof. At the final hearing each side produced two additional witnesses. Those for relatrix corroborated her on material matters and contradicted defendant regarding matters which he by his testimony had denied. Defendant's witnesses testified to negative facts which were without probative force and tended in no degree to establish any material controverted fact. The clear preponderance of the evidence is with relatrix. Defendant rests his case in a categorical denial of relatrix's testimony, but the evidential facts so clearly discredit his testimony that the trial Judge was justified in giving little heed to it.

While the parties were non-residents of this State, they were both within the jurisdiction of the court, as also was the child, who was born in Chicago. Defendant was arrested in Chicago on relatrix's complaint and appeared and pleaded without making any objection to the court's jurisdiction. It is now too late to urge this objection if it were otherwise well taken. Counsel for defendant admit in their brief that under the law of this State a non-resident may maintain a bastardy action; so counsel's contention that because the parties involved are non-residents the action cannot be maintained in this jurisdiction, falls of its own weight.

There is no error in this record and the judgment of the Municipal Court is affirmed. AFFIRMED.

of proof or challenge to the contrary it will be assumed that relatrix was unmarried at the time of conception. Furthermore relatrix testified that defendant was the only man she ever carnally knew. No attempt was made to prove otherwise.

The trial judge proceeded with care and circumspection in dealing with the issues. Considering relatrix as the instrument of convenience in efficacious use of testimony in denial of the charge, the learned trial judge continued the hearing for further proof. At the final hearing each side produced two additional witnesses. Those for relatrix corroborated her on material matters and contradicted defendant in material matters. The trial judge [illegible] defendant's witnesses testified in positive tones which were without probative force and tended in no degree to establish any material controverted fact. The clear preponderance of the evidence is with relatrix. Defendant rests his case in a categorical denial of relatrix's testimony, but the evidential facts so clearly discredit his testimony that the trial judge was justified in giving little heed to it.

While the parties were non-residents of this State, they were both within the jurisdiction of the court, as also was the child, who was born in Chicago. Defendant was arrested in Chicago on relatrix's complaint and appeared and pleaded without making any objection to the court's jurisdiction. It is now too late to urge this objection if it were otherwise well taken. Counsel for defendant admit in their brief that under the law of this State a non-resident may maintain a paternity action; so counsel's contention that because the parties involved are non-residents the action cannot be maintained in this jurisdiction, falls of its own weight.

There is no error in this record and the judgment of the Municipal Court is affirmed.

AFFIRMED.

281 - 21264

E. E. MC CARTHY and C. P. LARDIE, trading as McCARTHY & LARDIE, Appellants,	APPEAL FROM COUNTY COURT, COOK COUNTY.
vs.	
CHICAGO & NORTHWESTERN RAILWAY COMPANY, a corporation, Appellee.	

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered by the County Court of Cook County against the plaintiffs for costs, following a verdict of a jury in favor of defendant, in an action in assumpsit for damage to three cars of potatoes. The declaration contained two special counts as to each car and the common counts. One special count alleged the failure of defendant to safely and securely carry the potatoes, and the other alleged the failure of defendant to carry and deliver the same within a reasonable time. The defendant filed a plea of the general issue. Some of the potatoes in each car were frozen while at Manitowoc, Wisconsin, or while en route to Chicago, Illinois.

The potatoes were loaded into the cars at Spencer, Michigan. Before loading, false bottoms and partitions were placed in the cars at proper distances from the sides and ends thereof and were "doubled papered" in order to keep the potatoes from contact with the cold outer air, and a stove was placed in each of the cars. Three bills of lading, one for each car, were issued by the Pere Marquette Railroad Company on January 30, 1912, which showed that the potatoes had been received in apparent good order and were consigned

281 - 21264

M. S. M. CLEARY and J. F. [illegible],
trading as McCARTHY & LAMBIE,
Appellants,

vs.

CHICAGO & NORTHWESTERN RAILWAY
COMPANY, a corporation,
Appellee.

APPEAL FROM
[illegible]
COOK COUNTY.

1931 I.A. 405

MR. PRESIDING JUSTICE SCHAFER DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment rendered by the County Court of Cook County against the plaintiffs for costs, following a verdict of a jury in favor of defendant, in an action in assumpsit for damage to three cars of potatoes. The declaration contained two special counts as to each car and the common counts. One special count alleged the failure of defendant to safely and securely carry the potatoes, and the other alleged the failure of defendant to carry and deliver the same within a reasonable time. The defendant filed a plea of the general issue. Some of the potatoes in each car were frozen while at Manitowoc, Wisconsin, or while en route to Chicago, Illinois.

The potatoes were loaded into the cars at Spencer, Michigan. Before loading, false bottoms and partitions were placed in the cars at proper distances from the sides and ends thereof and were "doubled papered" in order to keep the potatoes from contact with the cold outer air, and a stove was placed in each of the cars. Three bills of lading, one for each car, were issued by the Pere Marquette Railroad Company on January 30, 1912, which showed that the potatoes had been received in apparent good order and were consigned

to plaintiffs at Chicago, Illinois, over route "Ludington & C. & N. W." The cars were conveyed to Traverse City, Michigan, and from thence to Ludington, Michigan. Plaintiffs' agent and caretaker, C. M. Martin, testified he rode on the cars from Traverse City to Chicago, and at all times kept a hot fire in the stove in each car. From Ludington the cars were taken across the lake by car ferry and arrived at Manitowoc, Wisconsin, about one o'clock on the afternoon of Friday, February 2, 1912. It was very cold in Manitowoc on February 2nd and 3rd. On the 2nd the temperature ranged from 15 degrees above to 7 degrees below zero, and on the 3rd from 3 degrees above to 16 degrees below zero. About two hours before the cars arrived by ferry at Manitowoc, plaintiffs, knowing of the weather conditions at Manitowoc, sent a telegram from Chicago to defendant's freight agent at Manitowoc, requesting defendant to accept the three cars (giving their numbers) and saying: "We will stand the loss if any by freezing; send cars forward today to Grand Avenue, Chicago." This telegram was received by said agent at 1:15 P. M. on February 2nd, about the time the cars arrived by ferry. Defendant received the cars at 2:30 P. M. on that day. They were placed for a short time on a side track and then hauled by defendant to its "Calumet" yard, about two miles distant, where freight trains bound for Chicago passed or were made up. The cars remained in said yard until about 4 P. M. on Saturday, February 3rd, when they left for Chicago in defendant's regular freight train, No. 180, arriving in Chicago on Monday, February 5th. Usually, such a freight train, carrying perishable goods bound for Chicago, left Manitowoc at said hour each day, but, owing to snow and weather conditions, the train scheduled to leave at 4 P. M. on February 2nd did not leave Manitowoc until 2 o'clock on the morning of February 3rd, arriving in Milwaukee,

to plaintiffs at Chicago, Illinois, over route "Ludington & C. & N. W." The cars were conveyed to Traverse City, Michigan, and from thence to Ludington, Michigan. Plaintiff's agent and caretaker, C. E. Martin, testified he rode on the cars from Traverse City to Chicago, and at all times kept a hot fire in the stove in each car. From Ludington the cars were taken across the lake by car ferry and arrived at Manitowoc, Wisconsin, about one o'clock on the afternoon of Friday, February 2, 1912. It was very cold in Manitowoc on February 2nd and 3rd. On the 2nd the temperature ranged from 15 degrees above to 7 degrees below zero, and on the 3rd from 5 degrees above to 15 degrees below zero. About two hours before the cars arrived by ferry at Manitowoc, plaintiffs, knowing of the weather conditions at Manitowoc, sent a telegram from Chicago to defendant's freight agent at Manitowoc, requesting defendant to accept the three cars (giving their numbers) and saying: "We will stand the loss if any by freezing; send cars forward today to Grand Avenue, Chicago." This telegram was received by said agent at 1:15 P. M. on February 2nd, about the time the cars arrived by ferry. Defendant received the cars at 2:30 P. M. on that day. They were placed for a short time on a side track and then hauled by defendant to its "Calumet" yard, about two miles distant, where freight trains bound for Chicago passed or were made up. The cars remained in said yard until about 4 P. M. on Saturday, February 3rd, when they left for Chicago in defendant's regular freight train, No. 180, arriving in Chicago on Monday, February 5th. Usually, such a freight train, carrying perishable goods bound for Chicago, left Manitowoc at said hour each day, but, owing to snow and weather conditions, the train scheduled to leave at 4 P. M. on February 2nd did not leave Manitowoc until 2

Wisconsin, late in the afternoon of that day. The train which left Manitowoc at 4 P. M. Saturday was the first regular freight train to leave after the departure of the freight train at 2 A. M. on February 3rd. After plaintiffs had sent the above mentioned telegram, and about noon on February 2nd, one of the plaintiffs, M. M. McCarthy, called on B. A. Little, assistant freight claim agent of defendant, in Chicago, and inquired if defendant would accept the cars on their arrival at Manitowoc, and Little informed McCarthy that defendant would not then accept perishable freight at junction points, such as Manitowoc, on account of the then existing weather conditions, and that on that morning defendant had wired instructions to its agents at certain junction points, including Manitowoc, not to receive perishable goods from shippers or connecting lines on account of the weather conditions. Subsequently, on the same day, plaintiffs again wired defendant's freight agent at Manitowoc, as follows: "Put cars we wired on this morning in round house. Wait instructions from Mr. Little." This telegram was received by defendant's said agent at 4:17 P. M. It does not appear that any instructions were afterwards received by said agent from Little or that Little was to send any. Defendant maintained a round-house at Manitowoc. It contained only 4 stalls, each stall capable of housing one engine or one freight car, and defendant there had no other facilities for "round-housing" engines or cars containing perishable goods. On the night of February 2nd two of defendant's engines were put in said round-house and two freight cars, of the refrigerator type having no stoves therein, containing perishable goods. It appears from the testimony that it is not the custom to "round-house" any car containing perishable goods where the car has false

Jacksonville, late in the afternoon of that day. The train which left Jacksonville at 1 P. M. Saturday was the first refrigerator freight train to leave after the assumption of the Creighton Week at 6 A. M. on Tuesday. The plaintiffs had sent the above mentioned telegram, and about noon on February 2nd, one of the plaintiffs, R. J. Rodgerby, called on E. A. Little, assistant freight claim agent of defendant, in Chicago, and inquired if defendant would accept the car on their arrival at Kankakee, and Little informed Rodgerby that defendant would not then accept perishable freight at junction points, such as Kankakee, on account of the then existing weather conditions, and that on that morning defendant had wired instructions to its agents at certain junction points, including Kankakee, not to receive perishable goods from shippers or connecting lines on account of the weather conditions. Subsequently, on the same day, plaintiffs again wired defendant's freight agent at Kankakee, as follows: "Just care we wired on this morning in round house. Wait instructions from Mr. Little." This telegram was received by defendant's said agent at 4:17 P. M. It does not appear that any instructions were otherwise received by said agent from Little or that Little was to send any. Defendant maintains a round-house at Kankakee. It contained only 4 stalls, each stall capable of housing one engine or one freight car, and defendant there had no other facilities for "round-housing" engines or cars containing perishable goods. On the night of February 2nd two of defendant's engines were put in said round-house and two freight cars, of the refrigerator type having on board thereon, containing perishable goods. It appears from the testimony that it is not the custom to "round-house" any car containing perishable goods where the car has taken

bottoms and sides and a stove therein and an attendant to maintain the fires, as was the case with the cars in question. It further appears from the testimony of plaintiffs' caretaker, Martin, in charge of the heating of the cars, that when freight train No. 180, scheduled to leave Manitowoc on the afternoon of February 2nd, finally arrived from the north about 2 o'clock on the morning of February 3rd, he heard the conductor of the train say that he could not put the three cars in said train for the reason that "he had his tonnage," which meant that he then had in his train all the cars he could haul on his division; that the cars in question remained in the yard exposed to the cold wind; that notwithstanding he kept a hot fire in the cars all the time some of the potatoes at the ends of the cars were frozen on February 3rd and before they left Manitowoc; and that they were in good condition and not frozen when they arrived in Manitowoc. It further appeared from the evidence that shortly after the arrival of the potatoes in Chicago, on February 5th, the same were sold, and that solely because of their frozen condition plaintiffs sustained a loss of about $773. It does not appear, however, that plaintiffs suffered any damages by reason of any unreasonable delay, if such delay there was, in the delivery of the potatoes at Chicago.

It is first contdnded by counsel for plaintiffs that, on the issue whether or not defendant failed in the performance of its implied contract to safely carry the potatoes from the time it received them at Manitowoc until it delivered them to plaintiffs at Chicago, the verdict is against the weight of the evidence. We do not think that it is. It should be borne in mind that plaintiffs, knowing of the weather conditions, wired defendant's agent at Manitowoc, before the cars were received by defendant, to accept the

bottom and sides and a stove therein and an attendant to maintain the fires, as was the case with the cars in question. It further appears from the testimony of plaintiffs' counsel, Martin, in charge of the heating of the cars, that when freight train No. 180, scheduled to leave Manitowoc on the afternoon of February 2nd, finally arrived from the north about 2 o'clock on the morning of February 3rd, he heard the conductor of the train say that he could not put the three cars in said train for the reason that "he had his tonnage," which meant that he then had in his train all the cars he could haul on his division; that the cars in question remained in the yard exposed to the cold wind; that notwithstanding he kept a hot fire in the cars all the time some of the potatoes at the ends of the cars were frozen on February 3rd and before they left Manitowoc; and that they were in good condition and not frozen when they arrived in Manitowoc. It further appears from the evidence that shortly after the arrival of the potatoes in Chicago, on February 5th, the same were sold, and that solely because of their frozen condition plaintiffs sustained a loss of about $775. It does not appear, however, that plaintiffs suffered any damages by reason of any unreasonable delay, if such delay there was, in the delivery of the potatoes at Chicago.

It is first contended by counsel for plaintiffs that, on the issue whether or not defendant failed in the performance of its implied contract to safely carry the potatoes from the time it received them at Manitowoc until it delivered them to plaintiffs at Chicago, the verdict is against the weight of the evidence. We do not think that it is. It should be borne in mind that plaintiffs, knowing of the weather conditions, wired defendant's agent at Manitowoc, before the cars were received by defendant, to accept the

cars and that they would stand any loss to the potatoes by freezing. The cars were not accepted by defendant until after the receipt of that telegram by defendant's agent at Manitowoc, and the subsequent acts of defendant in the handling of the cars at Manitowoc should, we think, be considered in the light of that telegram, the severe weather conditions then existing and the fact that the cars were heated by stoves in charge of plaintiffs' caretaker. Plaintiffs' second telegram to defendant's said agent was not received until about three hours after the receipt of the first telegram and until after defendant had received the cars in compliance therewith. Counsel for plaintiffs argue that the first telegram can not be construed as meaning any more than that plaintiffs would relieve defendant from its liability as an insurer and that plaintiffs did not intend to relieve defendant from liability resulting from its negligence. We are of the opinion, however, that the telegram and the action of defendant in accepting the cars thereafter should be considered as in the nature of a special agreement between the parties. Plaintiffs were anxious to get their potatoes as quickly as possible in Chicago, and, knowing of the weather conditions and that the cars might be held up at the ferry landing at Manitowoc on that account were willing to take chances of the potatoes freezing, especially so as the cars were heated and their caretaker was in charge of the cars, and, hence, they proposed to defendant that if it would accept the cars at once they would assume the risk of loss from freezing, and, acting upon the proposition, defendant accepted the cars. And, under all the facts and circumstances in evidence, we think that the jury were fully warranted in returning the verdict they did.

Counsel for plaintiffs further contend that the court erred in giving to the jury two instructions, Nos. 11 and 15.

care and that they would stand any loss to the potatoes by freezing. The cars were not accepted by defendant until after the receipt of that telegram by defendant's agent at Manitowoc, and the subsequent acts of defendant in the handling of the cars at Manitowoc should, we think, be considered in the light of that telegram, the severe weather conditions then existing and the fact that the cars were heated by stoves in charge of plaintiffs' caretaker. Plaintiffs' second telegram to defendant's said agent was not received until about three hours after the receipt of the first telegram and until after defendant had received the cars in compliance therewith. Counsel for plaintiffs argue that the first telegram can not be construed as meaning any more than that plaintiffs would relieve defendant from its liability as an insurer and that plaintiffs did not intend to relieve defendant from liability resulting from its negligence. We are of the opinion, however, that the telegram and the action of defendant in accepting the cars thereafter should be considered as in the nature of a special agreement between the parties. Plaintiffs were anxious to get their potatoes as quickly as possible in Chicago, and, knowing of the weather conditions and that the cars might be held up at the ferry landing at Manitowoc on that account were willing to take chances of the potatoes freezing, especially so as the cars were heated and their caretaker was in charge of the cars, and, hence, they proposed to defendant that if it would accept the cars at once they would assume the risk of loss from freezing, and, acting upon the proposition, defendant accepted the cars. And, under all the facts and circumstances in evidence, we think that the jury were fully warranted in returning the verdict they did.

Counsel for plaintiffs further contend that the court erred in giving to the jury two instructions, Nos. 11 and 15,

We are however of the opinion that, even if it be considered that the instructions were not strictly accurate, plaintiffs were not so prejudiced by the giving of them, or either of them, as warrants a reversal of the judgment and the remanding of the cause.

The judgment of the County Court is affirmed.

AFFIRMED.

We are however of the opinion that, even if it be considered that the instructions were not strictly accurate, plaintiffs were not so prejudiced by the giving of them, or either of them, as warrants a reversal of the judgment and the remanding of the cause.

The judgment of the County Court is affirmed.

AFFIRMED.

36 - 21285

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JAMES THOMAS and JOSEPH E. SNOWDEN	ERROR TO CRIMINAL COURT OF COOK COUNTY.
JOSEPH E. SNOWDEN, Plaintiff in Error.	198 I.A. 409

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Joseph E. Snowden, became surety on a recognizance taken in open court in the sum of $1,000 which was forfeited because of the non-appearance of the principal, James Thomas, in said Criminal court. Thereafter, on February 8, 1913, judgment was entered in favor of the People against Thomas and plaintiff in error in the sum of $1,000 and costs. To reverse the judgment plaintiff in error, on February 27, 1915, sued out this writ of error and moved that the same be made a supersedeas, which motion was on May 1, 1915, allowed by this court.

It appears from the original transcript of the record that Thomas was indicted by the grand jury of Cook county for larceny, that Thomas with plaintiff in error, as surety, entered into said recognizance, that Thomas did not appear and the recognizance was declared forfeited and a writ of scire fcaias ordered to be issued for them to show cause why the forfeiture should not be made absolute, and that on February 8, 1913, the court entered an order reciting that "the writ of scire facias issued herein has been duly returned by the Sheriff of Cook county," etc., and declaring that said forfeiture be made absolute and entered said judgment. Nowhere in said original transcript of the record

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in error,

vs.

JAMES THOMAS and JOSEPH H. SCHWEN,

Plaintiff in error.

ERROR TO
CRIMINAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE GRINNELL DELIVERED THE OPINION OF THE COURT:

Plaintiff in error, Joseph H. Schwen, became surety on a recognizance taken in open court in the sum of $1,000 which was forfeited because of the non-appearance of the principal, James Thomas, in said Criminal court. Therefore, on February 8, 1918, judgment was entered in favor of the People against Thomas and plaintiff in error in the sum of $1,000 and costs. To reverse the judgment plaintiff in error, on February 27, 1918, sued out this writ of error and moved that the same be made a supersedeas, which motion was on May 1, 1918, allowed by this court.

It appears from the original transcript of the record that Thomas was indicted by the grand jury of Cook county for larceny, that Thomas with plaintiff in error, as surety, entered into said recognizance, that Thomas did not appear and the recognizance was declared forfeited and a writ of scire facias ordered to be issued for them to show cause why the forfeiture should not be made absolute, and that on February 8, 1918, the court entered an order reciting that "the writ of scire facias issued herein has been duly returned by the sheriff of Cook county," etc., and declaring that said forfeiture be made absolute and entered said judgment. Nowhere in said original transcript of the record

is there contained any writ of scire facias.

Counsel for plaintiff in error, in their written suggestions filed with said motion for a supersedeas, contended that, notwithstanding the recital contained in the court's order of February 8, 1913, the judgment should be reversed because no writ of scire facias appeared in the transcript, and in support of their contention cited the case of Campbell v. People, 22 Ill. 234, 235, wherein our Supreme court said: "The office of a scire facias is both that of narr. and process, and the record should show, not by recital, but by its appearing in the record, that the writ was actually issued, giving a copy of it."

On January 10, 1916, the People filed in this court a motion suggesting diminution of the record and asking leave to supply the omitted portion of the record instanter, and at the same time presented a copy of said writ of scire facias, duly certified by the clerk of the Criminal court. Counter suggestions were filed and the decision on the motion was reserved to the hearing. On March 28, 1916, the motion was allowed and the copy of said writ was filed. On April 6, 1916, plaintiff in error filed a motion suggesting that said omitted portion of the record, so filed by the People, had been diminished by reason of the omission therefrom of the record of the proceedings of the Criminal court authorizing the filing in that court of said writ of scire facias on January 7, 1916, nunc pro tunc as of February 3, 1913, and asking leave to supply said record.

In view of the conclusion we have reached that said judgment of the Criminal court, entered February 8, 1913, must be reversed and the cause remanded, it is unnecessary for us to pass upon said motion of plaintiff in error.

We have carefully examined the copy of said writ of scire facias presented by the People and filed March 28, 1916. It appears on its face to have been issued by the clerk of the Criminal court on January 24, 1913. It recites that Thomas and

in there contained any writ of *mandamus*.

Counsel for plaintiff in error, in their written suggestions filed with said motion for a *supersedeas*, contended that, notwithstanding the recital contained in the court's order of February 8, 1913, the judgment should be reversed because no writ of *mandamus* appeared in the transcript, and in support of their contention cited the case of *Lumpkin* v. *People*, 22 Ill. 234, 238, wherein our supreme court said: "The office of a *mandamus* is both that of *mere*, and process, and the record should show, not by recital, but by its appearing in the record, that the writ was actually issued, giving a copy of it."

On January 10, 1916, the People filed in this court a motion suggesting diminution of the record and asking leave to supply the omitted portion of the record instanter, and at the same time presented a copy of said writ of *mandamus*, duly certified by the clerk of the Criminal court. Counsel suggestions were filed and the decision on the motion was reserved to the hearing. On March 28, 1916, the motion was allowed and the copy of said writ was filed. On April 6, 1916, plaintiff in error filed a motion suggesting that said omitted portion of the record, as filed by the People, had been diminished by reason of the omission therefrom of the record of the proceedings of the Criminal court authorizing the filing in that court of said writ of *mandamus* on January 7, 1916, nunc pro tunc as of February 8, 1913, and asking leave to supply said record.

In view of the conclusion we have reached that said judgment of the Criminal court, entered February 8, 1913, must be reversed and the cause remanded, it is unnecessary for us to pass upon said motion of plaintiff in error.

We have carefully examined the copy of said writ of *mandamus* presented by the People and filed March 28, 1916. It appears on its face to have been issued by the clerk of the criminal court on January 24, 1913. It recites that Thomas and

plaintiff in error entered into said recognizance in open court on July 22, 1912, that at the January, 1913, term of said court both Thomas and plaintiff in error made default, and that their recognizances were declared forfeited. The sheriff of Cook County is therein commanded to summon Thomas and plaintiff in error to appear before said court on the first day of the next term, to be held on the first Monday of February, 1913, to show cause, etc. The first Monday of February, 1913, was February 3rd. On the back of said writ is the return of the sheriff to the effect that he served the writ on Joseph E. Snowden (plaintiff in error) "this 3rd day of February, 1913," but that Thomas could not be found. On the back of the writ, also, is the endorsement, "Filed, Feb. 3rd, 1913, Frank J. Walsh, Clerk." Section 17 of Divison III of the Criminal Code (sec. 310, chap. 38, Hurd's Stat. 1912) provides in part as follows:

"When any person who is accused of any criminal offense shall give bail for his appearance, and such person does not appear in accordance with the terms of the recognizance, the court shall declare such recognizance forfeited, and the clerk of the court shall thereupon issue a scire facias against such person and his sureties, returnable on the first day of the next term of the court to show cause why such judgment should not be rendered against such person and his sureties for the amount of the recognizance, which scire facias shall be served by the sheriff of the county where the court is held, upon such person and his sureties, by reading the same to the defendants named in such scire facias, at least five days before the first day of the term to which the same is returnable; and, in case the person aforesaid cannot be found by the sheriff, he shall make return of that fact to the court. The court shall, thereupon, enter judgment by default against the defendants for the amount of the recognizance, unless defendants shall appear and defend such cause; and if the defendants shall appear and interpose a defense, then the cause shall be tried in the same manner as other causes of a like nature, after any such recognizance shall be declared forfeited as aforesaid."

The judgment against plaintiff in error was entered on February 8, 1913. It appears from said writ of scire facias, issued January 24, 1913, that the same was returnable on the first Monday of February, 1913 (February 3rd). It

plaintiff in error entered into said recognizance in open court on July 10, 1912, that at the January, 1913, term of said court both Thomas and plaintiff in error were defaulted, and that their recognizances were declared forfeited. The sheriff of Cook County is thereby commanded to summon Thomas and plaintiff in error to appear before said court on the first day of the next term, to be held on the first Monday of February, 1913, to show cause, etc. The first Monday of February, 1913, was February 3rd. On the back of said writ is the return of the sheriff to the effect that he served the writ on Joseph A. Sweden (plaintiff in error) "this 3rd day of February, 1913," but that Thomas could not be found. On the back of the writ, also, is the endorsement, "Filed, Feb. 3rd, 1913, Frank J. Walsh, Clerk." Section 17 of Division III of the Criminal Code (see. 210, chap. 38, Hurd's Stat. 1912) provides in part as follows:

"When any person who is accused of any criminal offense shall give bail for his appearance, and such person does not appear in accordance with the terms of the recognizance, the court shall declare such recognizance forfeited, and the clerk of the court shall thereupon issue a writ of scire facias against such person and his sureties, returnable on the first day of the next term of the court to show cause why such judgment should not be rendered against such person and his sureties for the amount of the recognizance, which writ of scire facias shall be served by the sheriff of the county where the court is held, upon such person and his sureties, by reading the same to the defendants named in such writ of scire facias, at least five days before the first day of the term to which the same is returnable; and, in case the person aforesaid cannot be found by the sheriff, he shall make return of that fact to the court. The court shall, thereupon, enter judgment by default against the defendants for the amount of the recognizance, unless defendants shall appear and defend such cause; and if the defendants shall appear and interpose a defense, then the cause shall be tried in the same manner as other causes of a like nature, after any such recognizance shall be declared forfeited as aforesaid."

The judgment against plaintiff in error was entered on February 8, 1913. It appears from said writ of scire facias, issued January 24, 1913, that the same was returnable on the first Monday of February, 1913 (February 3rd). It

further appears that the writ was not served upon plaintiff in error until February 3rd. He was not served "at least five days before the first day of the term" to which said writ was returnable. In our opinion the court was without jurisdiction to enter final judgment against him on February 8, 1913, or at any time during said February term, because he was not served in apt time to require him to show cause at said term, and that said judgment is void. (People v. Moore, 143 Ill. App. 382, 385.) In the case cited it is said: "The jurisdiction of both the subject-matter and of the person is essential to the validity and binding force of a judicial sentence. If either of these judicial facts is wanting then the sentence or decree of the court is void. In such a case the whole proceeding is coram non judice." (See, also, Campbell v. McCahan, 41 Ill. 45, 49; Mulford v. Stalzenback, 46 Ill. 303, 306; Gardner v. Bunn, 132 Ill. 403, 410: French v. Regan, 58 Ill. App. 261.)

The judgment of the Criminal court is reversed and the cause remanded.

REVERSED AND REMANDED.

further appears that the writ was not served upon plaintiff in error until February 2nd. He was not served "at least five days before the first day of the term" to which said writ was returnable. In our opinion the court was without jurisdiction to enter final judgment against him on February 6, 1913, or at any time during said February term, because he was not served in apt time to require him to show cause at said term, and that said judgment is void. (People v. Moore, 143 Ill. App. 382, 385.) In the case cited it is said: "The jurisdiction of both the subject-matter and of the person is essential to the validity and binding force of a judicial sentence. If either of these judicial faces is wanting then the sentence or decree of the court is void. In such a case the whole proceeding is coram non judice." (See, also, Campbell v. McGahan, 41 Ill. 69, 80; Milford v. Stalzenbach, 46 Ill. 308, 310; Hardner v. Shum, 132 Ill. 103, 110: Kemph v. Regan, 58 Ill. App. 361.)

The judgment of the Criminal court is reversed and the cause remanded.

REVERSED AND REMANDED.

36 - 21285

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JAMES THOMAS and JOSEPH E. SNOWDEN, ----- - ----- JOSEPH E. SNOWDEN, Plaintiff in Error.	ERROR TO CRIMINAL COURT, COOK COUNTY.

193 I.A. 409

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

~~Plaintiff in error~~, Joseph E. Snowden, became surety on a recognizance taken in open court in the sum of $1,000 which was forfeited because of the non-appearance of the principal, James Thomas, in ~~said~~ the Cook County Criminal Court. Thereafter such proceedings were had in said court that on February 8, 1913, judgment was entered in favor of the People against Thomas and ~~plaintiff in error~~ Snowden in the sum of $1,000 and costs. To reverse the judgment ~~plaintiff in error~~ Snowden on February 27, 1915, sued out ~~this~~ writ of error and moved that ~~the~~ same be made a supersedeas, filing with the motion certain written suggestions, which motion was on May 1, 1915, allowed by ~~this~~ the Appellate Court.

It appears from the original transcript of the record that Thomas was indicted by the grand jury of Cook County for larceny, that Thomas, with ~~plaintiff in error~~ Snowden, as surety, entered into said recognizance, that Thomas did not appear and the recognizance was declared forfeited and a writ of scire facias ordered to be issued for them to show cause why the forfeiture should not be made absolute, and that on February 8, 1913, the criminal court entered an order reciting that "the writ of scire facias issued herein has been duly returned by the Sheriff of Cook county," etc., and declaring that said forfeiture be made absolute and entered said judgment. Nowhere in ~~said~~ the original transcript of the record ~~is~~ was there contained any writ of scire facias.

Plaintiff in error, Joseph E. Thomas, became surety on a recognizance taken in open court in the sum of $1,000 which was forfeited because of the non-appearance of the principal, James Thomas, in said criminal court. Thereafter such proceedings were had in said court that on February 8, 1918, judgment was entered in favor of the People against Thomas and plaintiff in error in the sum of $1,000 and costs. To reverse the judgment plaintiff in error on February 27, 1918, sued out this writ and moved that the same be made a supersedeas, filing with the motion certain written suggestions, which motion was on May 1, 1918, allowed by this court.

It appears from the original transcript of the record that Thomas was indicted by the grand jury of Cook County for larceny, that Thomas with plaintiff in error, as surety, entered into said recognizance, that Thomas did not appear and the recognizance was declared forfeited and a writ of nulla tacias ordered to be issued for them to show cause why the forfeiture should not be made absolute, and that on February 8, 1918, the court entered an order reciting that "the writ of nulla tacias issued herein has been duly returned by the Sheriff of Cook county," etc., and declaring that said forfeiture be made absolute and entered said judgment. Nowhere in said original transcript of the record is there contained any writ of nulla

Counsel for plaintiff in error, in their written suggestions filed with the motion above mentioned for a supersedeas, contended that notwithstanding the recital contained in the court's order of February 8, 1913, the judgment should be reversed inasmuch as no writ of scire facias appeared in the transcript, and in support of their contention cited the case of Campbell v. People, 22 Ill. 234, 235, wherein our Supreme Court said: "The office of a scire facias is both that of narr. and process, and the record should show, not by recital, but by its appearing in the record, that the writ was actually issued, giving a copy of it."

On January 10, 1916, the State's attorney filed in this court a motion, supported by affidavit, suggesting dimunition of the record and asking leave to supply the omitted portion of the record instanter, and at the same time presented a copy of said scire facias, duly certified by the clerk of said Criminal Court. Counter suggestions to the motion were filed by counsel for plaintiff in error and, by order of this court, the decision on the motion was reserved to the hearing. These counter suggestions have been duly considered, but we are of the opinion that leave should be granted to file said omitted portion of the record and it is so ordered.

The copy of said writ of scire facias discloses that it was issued by the clerk of the Criminal court, that it was served by the sheriff of Cook county on plaintiff in error, Thomas not being found, and that it was returned by the sheriff and filed in the clerk's office.

The copy of said writ of scire facias now appearing in the transcript of the record, and the only point relied upon and argued by counsel for plaintiff in error for a reversal of the judgment being the absence of such copy, the judgment is affirmed.

AFFIRMED.

Counsel for plaintiff in error, in their written suggestions filed with the motion above mentioned for a supersedeas, contended that notwithstanding the recital contained in the court's order of February 8, 1926, the judgment should be reversed inasmuch as no writ of *scire facias* appeared in the transcript, and in support of their contention cited the case of *Campbell v. People*, 92 Ill. 214, 216, wherein our Supreme Court said: "The office of a *scire facias* is both that of mere, and process, and the record should show, not by recital, but by its appearing in the record, that the writ was actually issued, giving a copy of it."

On January 10, 1926, the State's attorney filed in this court a motion, supported by affidavit, suggesting diminution of the record and asking leave to supply the omitted portion of the record instanter, and at the same time presented a copy of said *scire facias*, duly certified by the clerk of said Criminal Court. Counter suggestions to the motion were filed by counsel for plaintiff in error and, by order of this court, the taking on the motion was reserved to the hearing. These counter suggestions have been duly considered, but we are of the opinion that leave should be granted to file said omitted portion of the record and it is so ordered.

The copy of said writ of *scire facias* discloses that it was issued by the clerk of the Criminal court, that it was served by the sheriff of Cook county on plaintiff in error, Thomas not being found, and that it was returned by the sheriff and filed in the clerk's office.

The copy of said writ of *scire facias* now appearing in the transcript of the record, and the only point relied upon and argued by counsel for plaintiff in error for a reversal of the judgment being the absence of such copy, the judgment is affirmed.

324 - 21308

RUDOLPH ELLER,
Appellee,

vs.

FRANCES A. ELLER,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

198 I.A. 411

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree granting the husband a divorce on the ground of extreme and repeated cruelty, dismissing the wife's cross-bill for separate maintenance, directing partition of certain real estate owned by them as tenants in common, and appointing a receiver to collect the rents from the property pending the partition proceedings.

Appellant contends that the decree is against the clear preponderance of the evidence that the cross-bill is supported by the greater weight of the evidence that the court had no jurisdiction to make partition or appoint a receiver.

The decree found that the wife had since their intermarriage been guilty of extreme and repeated cruelty substantially as charged in the bill of complaint, that she was a woman of great austerity of temper, that she indulged in violent sallies of passion, that she had on two occasions used personal violence towards her husband, striking him once a violent blow in the face resulting in pain and loosening his teeth and at another time on his hand with a heavy hatchet bruising it and causing pain; and that she used towards him opprobrious, obscene and abusive language without provocation, and maliciously and without reasonable cause accused him of having unlawful sexual intercourse with

RUDOLPH MILLER, Appellee,	
vs.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
Martha A. Miller, Appellant.	

195 I.A. 411

MR. JUSTICE MACRAE DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree granting the husband a divorce on the ground of extreme and repeated cruelty, dismissing the wife's cross-bill for separate maintenance, dividing particular of certain real estate owned by them as tenants in common, and requiring a receiver to collect the rents from the property pending the partition proceedings.

Appellant contends that the decree is against the clear preponderance of the evidence (1) that the cross-bill was supported by the greater weight of the evidence (2) that the court had no jurisdiction to make partition or appoint a receiver.

The decree found that the wife had since their intermarriage been guilty of extreme and repeated cruelty substantially as charged in the bill of complaint, that she was a woman of great austerity of temper, that she indulged in violent acting of passion, that she had on her premises used personal violence towards her husband, striking him once a violent blow in the face resulting in pain and lasting his health, and at another time on his head with a heavy bottle, bruising it and causing pain; and that she used towards him opprobrious, obscene and abusive language without provocation, and maliciously and without reasonable cause accused him of having unlawful sexual intercourse with

one of his tenants.

That there was sufficient evidence on which to base each finding, does not admit of argument, in our opinion, and whether such evidence clearly preponderates in complainant's favor, depends altogether upon the credibility of the witnesses, whom the opportunity to see as well as hear gave the chancellor a facility not possessed by this court, one which has been referred to as of the greatest importance in determining the weight and credibility of evidence. (Corari v. Olsen, 91 Ill. 277; Johnson v. Johnson, 125 id. 510; Porter v. Porter, 162 id. 378.)

The charges made in the cross-bill were of the same nature and character as those charged in the bill, and the evidence was irreconcilably conflicting at most of the essential points, thus requiring close consideration of the credibility of the respective witnesses, and so far as its determination became an evident factor in finding the facts, we shall not undertake to disturb the decree or analyze the evidence that seemingly justifies the court's findings.

~~For instance, we note that~~ against the evidence of seven witnesses as to her use of opprobrious epithets and abusive language towards him, ~~stands~~ there was her bare uncorroborated denial, and against three witnesses charging him with similar language towards her, ~~rests~~ there was his bare denial. The motives and interests of these several witnesses ~~are~~ were not sufficiently disclosed in the record, ~~to enable us to give their testimony due weight.~~ Their appearance and conduct while testifying may well have been the final test by which their credibility was determined. The application of such test is a well recognized function of the chancellor, and one of much importance when it is clear that one party or set of witnesses or the other is manifestly falsifying, and, applying the maxim falsus in uno falsus in omnibus, the chancellor may well have discounted her

one of his lawsuits.

Had there been sufficient evidence on which to base such finding, does not admit of argument. In our opinion, and another such evidence clearly preponderates in complainant's favor, depends altogether upon the credibility of the witnesses, upon the opportunity to see as well as hear have the demeanor of witnesses not possessed by this court, one which has been referred to as of the greatest importance in determining the weight and credibility of evidence. (Gorrell v. Olsen, 91 Ill. 277; Johnson v. Johnson, 125 id. 510; Porter v. Porter, 125 id. 372.)

The charges made in the cross-bill were of the same nature and character as those charged in the bill, and the evidence was irreconcilably conflicting at most of the essential points. This requiring close consideration of the credibility of the respective witnesses, and so far as its determination becomes an evident factor in finding the facts, we shall not undertake to disturb the decree or analyze the evidence that seemingly justifies the court's finding.

For instance, we note that against the evidence of seven witnesses as to her use of opprobrious epithets and abusive language towards him, [illegible] have been uncorroborated denial, and against three witnesses charging him with similar language towards her, [illegible] his bare denial. The motives and interests of these several witnesses are not sufficiently disclosed in the record, [illegible] us to give their testimony the weight. Their appearance and conduct while testifying may well have been the final test by which their credibility was determined. The application of such test is a well recognized function of the chancellor, and one of such importance that it is clear that any party or act of attorney or the court is sufficiently justifying, and, applying the maxim falsus in uno falsus in omnibus, the chancellor may well have disregarded her

versions of the acts of physical violence.

~~While~~ Her version as to both incidents of physical violence was supported by her son, who took an active part in her behalf in one of them, her daughter and another witness, as to one occasion, and her daughter and son-in-law, as to the other occasion, corroborated in the main his version of the affairs. The main acts of cruelty charged by her against him were parts of the same incidents relied upon to establish his charges of the same character, ~~and must stand or fall by the test of credibility.~~ It would subserve no useful or practical purpose, therefore, to narrate here the details of these incidents. We are satisfied that giving credence, as the chancellor must have done, to complainant's witnesses, there was sufficient evidence of intentional commission without just provocation of two distinct acts of physical violence against him of a painful and serious character, while she was in a state of ungovernable temper and evincing an utter disregard of any danger that might attend them.

~~When these incidents are considered in connection with~~ There was evidence showing the history of their family troubles, which apparently began over money matters in which he was seemingly fair and generous, and showing that he had always evinced a kind and peaceable disposition towards her and her children by a former marriage, and that she was a large, strong woman, of high temper and wilful quarrelsome disposition, given to vituperative and vulgar language towards him and his tenants (all of whom testified for him and against her) and that she had evinced a manifest disposition to get hold of his property and to get rid of him, and had previously without good grounds filed a bill for separate maintenance which she dismissed containing unjustifiable charges against him, and that

versions of the acts of physical violence.

Her version as to both incidents of physical violence was supported by her son, who took an active part in her behalf in one of them, her daughter and another witness, on one occasion, and her daughter and son-in-law, on the other occasion, corroborated in the main his version of the affairs. The main acts of cruelty charged by her against him were parts of the same incidents relied upon to establish his charges of the same character, and stand or fall by the test of credibility. It would subserve no useful or practical purpose, therefore, to narrate here the details of these incidents. We are satisfied that giving credence, as the chancellor must have done, to complainant's witnesses, there was sufficient evidence of intentional commission without just provocation of two distinct acts of physical violence against him of a painful and serious character, while she was in a state of unpreventable temper and evincing no utter disregard of any danger that might attend them.

With evidence showing the history of their family troubles, which apparently began over money matters in which he was seemingly fair and generous, and showing that he had always evinced a kind and peaceable disposition towards her and her children by a former marriage, and that she was a large, strong woman, of high temper and willful quarrelsome disposition, given to vituperative and vulgar language towards him and his friends (all of whom testified for him and against her) and that she had evinced a manifest disposition to get hold of his property and to get rid of him, and had previously without good ground filed a bill for separate maintenance which she dis-

he ~~is not~~ was at the time of trial nearly seventy years old (her senior by about eighteen years), we think the fact of extreme and repeated cruelty, as heretofore interpreted by our Supreme Court, was fully established and justified the decree.

The other point made by appellant as to the court's want of jurisdiction to make partition of their real estate and appoint a receiver to collect the rents, is so clearly untenable that we need only to refer to appellee's authorities to which appellant has not undertaken to reply. (Harrer v. Fullner, 80 Ill. 197; Heyman v. Heyman, 210 id. 524; Van Vleet v. De Witt, 20[illegible] id. 153.) Besides appellant is in no position to raise such question on its merits, as it appears that the parties had by mutual agreement settled all controversies and questions respecting their real estate, and it is so found in the decree.

So far as the question is one of multifariousness in pleading it is improperly raised here for the first time. (Chi. Theological Seminary v. Gage, 103 id. 175).

The decree will be affirmed.

AFFIRMED.

be somewhat nearly seventy years old (her senior by about eighteen years)we think the fact of estrema and repeated annuity, as it therefore interpreted by our Supreme Court, was fully established and justified the decree.

The other point made by appellant as to the Court's lack of jurisdiction to make partition of their real estate and create a trustee, is clearly the result, in an strictly unbearable that, in equal mode to refer to appellant's authorities to which reference has not undertaken to apply. (Barnes v. Sullivan, 90 Ill. 167; Kinnan v. Kinnan, 112 id. 384; Van Vleet v. De Witt, 200 id. 182) Neither appellant is in no position to raise such question on its behalf, as it appears that the guardian had in writing signed all conveyances and receipts concerning their real estate, and is so bound by the course.

As far as the question is one of ch.jurisdiction we feeling it is improperly raised here for the first time. (Chi. Theological Seminary v. Bass, 120 id. 179).

The decree will be affirmed.

AFFIRMED.

334 - 21319

THERON J. DYKE,
Appellant,

vs.

MILTON E. PETTY, HENRY E. PETTY and JOHN McFEELY,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

193 I.A. 414

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order vacating a judgment taken against appellees (defendants below) on default. The order was based on a motion in writing made at a subsequent term in behalf of said Milton E. Petty to correct an alleged error in fact, as may be done under section 89 of the Practice Act (J. & A. ¶ 8626), which substitutes such a motion for the writ of error coram nobis. The basis of the proceeding was the contention that said Petty was mentally incapacitated when served with summons and remained so until after judgment, and the request of plaintiff for an oral hearing was denied and the hearing was had on affidavits. As is the proper practice, (Domitski v. The American Linseed Company, 221 Ill. 161, 166.) while an oral hearing, as requested by plaintiff, might have been had in the discretion of the court under section 86 of the Practice Act, the record discloses no abuse of discretion in denying the request.

There were two affidavits in support of the motion and two counter affidavits. The former were by physicians, who attended on said Petty in the period referred to, and contained positive, unqualified averments that he was then wholly irresponsible and mentally incapacitated. The counter affidavits were, one by the deputy sheriff, who expressed a contrary opinion, and one by plaintiff's counsel containing

No. 21970

THEODOR J. OTTO,
Appellant,

vs.

ELLEN J. PETTY, EDGAR
E. PETTY and LINA [illegible],
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

1931 A. 414

MR. JUSTICE MARKES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order vacating a judgment [illegible] (defendants below) on default. The order was based on a motion in writing made at a subsequent term in behalf of said Ellen E. Petty to correct an alleged error in fact, as may be done under section 89 of the Practice Act which authorizes such a motion for the writ of error coram nobis. The basis of the proceeding was the contention that said Petty was mentally incapacitated when served with summons and remained so until after judgment and the hearing was had on affidavits. [illegible]

(Dowlatzi v. The Western Illinois Company, 331 Ill. 180, 184.) While an oral counter-, or rebuttal by plaintiff, which was been had in the discretion of the trial under section 89 of the Practice Act, the court dismissed the issue of incapacity to answer the request.

There were two affidavits in support of the motion and two counter affidavits. The former were by physicians, who attended on said Petty in the period referred to, and contained positive, unqualified averments that he was then mentally irresponsible and mentally incapacitated. The counter affidavits were one by the county sheriff, who expressed a contrary opinion, and one by plaintiff's counsel containing

matter almost entirely hearsay in character.

The order fails to make an express finding of fact but it was unquestionably based on a finding that said Petty was mentally incapacitated during said period, for that was the only issue raised and to be determined in the proceeding. We shall not disturb the order because of such informality. We think it was justified by affidavits of persons most capable of judging of mental conditions, and in reaching the conclusion we disregard the motions and petition first filed as the subsequent motion here considered properly presented the question on which the issue was taken.

AFFIRMED.

motion almost entirely between as material.

The order fails to make an express finding of fact but it was unquestionably based on a finding that said girl was mentally incapacitated during said period, for that was the only issue raised and is be determined in the proceeding. We shall not disturb the order because of such informality. We think it was justified by affidavits of witnesses most capable of judging of mental conditions, and in reaching the conclusion we disregard the motions and petition filed filed as the subsequent motion here considered properly presented the question on which the issue was taken.

AFFIRMED.

350 - 21335

ALBERT HERTEL,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

193 I.A. 415

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit to recover damages for personal injuries. The verdict and judgment were for $4000. The company's appeal is based on the contentions that (1) the verdict is contrary to the law and the evidence and (2) is excessive.

Hertel, the plaintiff, was a passenger on one of defendant's cars that in a backward movement collided with a wagon and horses attached to it. He was probably thrown from the car and sustained injuries therefrom.

The declaration charged that the motorman of the car "wrongfully, improperly and negligently caused the car to be suddenly and quickly started and in a backward direction, and to be operated swiftly in a backward * * * direction" against a certain wagon in the rear of said car.

The car was an open, light summer car operated by electricity. To avert a collision with a wagon that was suddenly turned in front of it the motorman applied the reverse power thus causing the car to stop and run backward probably about one hundred feet to the point where the collision occurred.

Whatever view may be taken of the sufficiency of plaintiff's proof when he rested to show the specific

negligence complained of, and whether the case can be said to come within the rule of res ipsa loquitur, we think the evidence submitted to the jury warranted a finding of the negligence complained of. Whatever was lacking in plaintiff's proof was supplied by the testimony of the motorman, who, although he claimed as the reason why he could not stop the car in its backward movement that the reverse lever became stuck so that he could not move it back, failed both to shut off the electric power and to apply the brake after the car started backward. We think his own evidence was such as to justify belief that from his manifest inexperience and confusion he neglected to resort to either of said means the exercise of which would doubtless have prevented the accident.

But we think the verdict was excessive. The evidence of the extent of plaintiff's injuries and how far they impaired either his permanent health or ability to work, is not as satisfactory as it should be. His principal injury seems to have been the dislocation of his arm which was immediately set. He was laid up in bed for seven weeks when his doctor told him he could go to work and he resumed labor of the same kind in which he had been previously engaged, that of sausage making, and in which he remained at undiminished wages for about a year, when he laid off for four months, claiming that he had pains in his arm and other parts of the body. He consulted no physician, but acting on his own judgment treated himself at home with steam baths. He then went back to the work of sausage making for three months. Why he left it does not appear, unless to take the easier work of tying pork loins together at which he was employed at the time of trial. He then got $12 per week. Prior to the accident he received $18. For a year after the

negligence complained of, and whether the case can be said to come within the rule of res ipsa loquitur, we think the evidence submitted to the jury warranted a finding of the negligence complained of. Whatever was locking in plaintiff's proof was supplied by the testimony of the motorman, who, although he claimed as the reason why he could not stop the car in the ordinary movement that the reverse lever became stuck so that he could not move it back, failed both to exert all the electric power and to apply the brakes after the car started backward. We think his own evidence was such as to justify belief that from his manifest inexperience and confusion he neglected to resort to either of said means the employment of which would doubtless have prevented the accident.

But we think the verdict was excessive. The evidence of the extent of plaintiff's injuries and how far they impaired either his permanent health or ability to work, is not so satisfactory as it should be. The principal injury seems to have been the dislocation of his arm which was immediately set. He was laid up in bed for seven weeks when his doctor told him he could go to work and resumed he labor of the same kind in which he had been previously engaged, that of message making, and in which he remained at undiminished wages for about a year, when he laid off for four months, claiming that he had pains in his arm and other parts of the body. He consulted no physician, but acting on his own judgment treated himself at home with steam baths. He then went back to the work of message making for three months. Why he left it does not appear, unless it was the earlier case of flying back into another vehicle he was employed in the time of trial. He then got the job he was prior to the accident he received in. For a year after the

accident his wages were from $20 to $25. How much harder sausage making is than tying loins the record does not disclose, nor why plaintiff may not still follow his former occupation, for he seems to experience the same pains in each kind of work.

However, he evidently experienced some limitation in the use of his right arm and bodily pains and should have compensation therefor. But any other disabilities that resulted from the accident are somewhat conjectural, at any rate very meagerly and unsatisfactorily shown.

The accident occurred August 20, 1912. He ceased to have medical attendance and resumed work October 28th. The treatment he received from his physician aside from changing the bandage on his arm consisted of rubbing his back with medicine which his wife continued to do for four months. He has not sought nor received medical care since. His physician died before the trial. He is apparently an ignorant man with little knowledge of the human anatomy or the causes of bodily ills. The verdict was based on his rather unintelligible description of them, without the aid of any medical testimony as to his physical condition, or the seriousness or cause of the seemingly minor troubles, aside from the condition of his arm, of which he complained. If they were of a serious or permanent nature and reasonably attributable to the accident and such as to impair his general health or capacity for work, it is difficult to understand why medical testimony relating to his condition was not produced. The evidence is by no means convincing as to the extent of either his physical impairment or sufferings, or whether he may not still do the work he has done in the past even since the accident, or whether the difference in wages between those received forathree months prior to the trial and those re-

accident his wages were from [illegible] to [illegible]. Now much greater
leakage making is even lying into the report does not obtain-
alone, nor did plaintiff say yet right [illegible] the
stoppation, for he seems to superintend the same going in
full kind of work.

However, he probably exaggerated some limitation
in the use of his right arm and possibly pains and should have
compensation therefor. And any other disabilities that re-
sulted from the accident are temporary, complete, - if any
but very remote and insignificant.

The accident occurred August [illegible], 1921. He ceased
to have medical attendance and resumed work October [illegible].
The presumption is relieved from his operation aside from
observing the bandage on his arm constantly or making his back
stiff-muscles which his wife continued to do for four months.
He has not frequently received medical care since. His
physician died before the trial. He is [illegible] a normal
man with little knowledge of the human anatomy or the causes
of bodily ills. The verdict was based on his rather unintelli-
gible description of them, with no the aid of any medical
testimony as to his physical condition, or the probableness
or cause of the [illegible] injury, aside from the
condition of his arm, of which he complained. If he by rea-
of a serious or permanent nature and reasonably attributable
to the accident and such as to impair his general health or
capacity for work, it is difficult to understand why medical
testimony relating to his condition was not produced. The
evidence is by no means convincing as to the extent of either
his physical impairment or suffering, or whether he may not
still do the work he had done in the past from some [illegible]
accident, or whether the difference in wages between those
received formerly more being paid to the trial and those re-

ceived prior to the accident measures the degree of physical impairment. If therefore appellee will enter a remittitur of $1000 within ten days the judgment will be affirmed. Otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

356 - 21341

GENNARO CALABRESE, Appellee,	
vs.	APPEAL FROM THE SUPERIOR COURT,
ANTON J. CERMAK, Bailiff of the Municipal Court, Appellant.	COOK COUNTY.

193 I.A. 418

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~This was a replevin~~ The suit was tried before the court without a jury. The court found the defendant Cermak guilty and the right of possession of the property in question in plaintiff ~~Calabrese~~. The property was levied on under a judgment in favor of the Common Sense Company against Calabrese's brother Vincent. No propositions of law were submitted to the court to be held as such and no question of law ~~is~~ was otherwise presented in the record. The only question ~~properly before us for consideration is~~ considered by the Appellate Court was the sufficiency of the evidence as to the ownership of the property.

The property levied on consisted of a soda water fountain, a show case, a safe and cash register in a drug store that had been owned and conducted by Vincent for some years. Being indebted to Gennaro he executed a bill of sale to him of the drug stock and fixtures including said property so levied on, on September 19, 1913. Gennaro took possession on that date and sought to evidence the transaction by recording his bill of sale September 22nd. He hired a party to conduct the store and gave Vincent desk room therein for another line of business. His possession seems to have been an open one, ~~and there was~~ sufficient evidence from which

CHARLES DALABRESE,
Appellee,

vs.

ALFRED L. VINCENT,
Defendant and Cross-Appellant,
Appellant.

APPEAL FROM THE
MORRISON DISTRICT,
CASS COUNTY.

MR. JUSTICE RAMBEN DELIVERED THE OPINION OF THE COURT:

This was a replevin suit tried before the court without a jury. The court found the defendant Cross-guilty and the right of possession of the property in question in plaintiff Dalabrese. The property was levied on under a judgment in favor of the Common Sense Company against Dalabrese's brother Vincent. No propositions of law were submitted to the court to be held as such and no question of law be otherwise presented in the record. The only question properly before us for consideration is the sufficiency of the evidence as to the ownership of the property.

The property levied on consisted of a soda water fountain, a show case, a safe and cash register in a drug store that had been owned and conducted by Vincent for some years. Being indebted to Gamaro he executed a bill of sale to him of the drug stock and fixtures including said property so levied on, on September 19, 1910. Gamaro took possession on that date and sought to evidence the transaction by recording his bill of sale September 22nd. He hired a party to conduct the store and gave Vincent back from therein for another line of business. His possession seems to have been an open one, and there was sufficient evidence from which

to find that the transaction was valid and free from fraud unless it contravened the Bulk Sales Act. It was conceded that no notice of the sale was previously given to the Common Sense Company. But the court properly found that it ~~was not a~~ creditor at the date of the sale. While ~~it~~ and company had received an order from Vincent for goods prior to said sale it did not deliver them until subsequent thereto, and there was ~~was nothing in that circumstance or any other~~ no evidence that established either in law or fact the relationship of creditor and debtor between said company and Vincent prior to said sale. We find no occasion for disturbing the judgment.

AFFIRMED.

to find that the transaction was valid and free from fraud unless it contravened the Bulk Sales Act. It was conceded that no notice of the sale was previously given to the common Sense Company. But the court properly found that it was not a creditor at the date of the sale. While it had received an order from Vineent for goods prior to said sale it did not deliver them until subsequent thereto, and there was nothing in that circumstance or any other evidence that established either in law or fact the relationship of creditor and debtor between said company and Vineent prior to said sale. We find no occasion for disturbing the judgment.

Affirmed.

367 - 21352

IN RE ESTATE OF WOLF FREILICH, Deceased.

EVA FREILICH, individually and as executrix of the estate of WOLF FREILICH, deceased,

Appellant.

vs.

MOSES FREILICH and CELIA SCHONFELD,

Appellees.

APPEAL FROM THE CIRCUIT COURT, COOK COUNTY.

198 I.A. 420

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~This~~ Appeal ~~is~~ from an order in the Circuit Court affirming in effect an order of the Probate Court directing Eva Freilich ~~appellant as~~ executrix of the last will and testament of Wolf Freilich, deceased, to pay out of funds in her hands, to two legatees under the will, $1500 each, on account of their legacies thereunder.

In the condition of the estate we think the order of the Probate Court was premature and should not have been upheld. When ~~it~~ was made in the Probate Court it appeared that the executrix had in her hands $14,459.70, that the uncollected accounts of the estate were deemed worthless and that there were pending claims against the estate amounting to $4,495.10. It also appeared that ~~appellant~~ executrix had not been allowed any compensation for her services as such executrix, nor fees for her counsel. The Circuit Judge, on the proof before him, estimated that the latter might equal $1700, and from the showing of record her compensation as executrix might aggregate, on a full statutory allowance, $7560. Even if, as contended by appellees, the Probate Court may have taken into consideration what amount was properly allowable for her compensation and her counsel's

No. 11496

IN RE ESTATE OF WOLF
PRESSLICH, Deceased.

EVA PRESSLICH, individually
and as executrix of the
estate of WOLF PRESSLICH,
Deceased,

Appellant.

vs.

ROSE PRESSLICH and SOLA
GOLDBERG,

Appellees.

APPEAL FROM THE
CHANCERY DIVISION
OF THE
COOK COUNTY
COURT.

1955 T.A. 120

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT:

This appeal is from an order affirming in effect an order of the Probate Court directing appellant as executrix of the last will and testament of Wolf Pressliek, deceased, to pay out of funds in her hands to two legatees under the will $1500 each on account of their legacies thereunder.

In the condition of the estate we think the order of the Probate Court was premature and should not have been entered. When it was made it appeared that the executrix had in her hands $14,489.76, that the uncollected accounts of the estate were deemed worthless and that there were pending claims against the estate amounting to $4,429.10. It also appeared that appellant had not been allowed any compensation for her services as executrix, nor fees for her counsel. The circuit judge, on the proof before him, estimated that the latter might equal $1700, and from the showing of record her compensation as executrix might amounts on a full statutory allowance $2800. Even if, as contended by appellees, the Probate Court may have taken into consideration what amount

fees when the order was entered, yet the fact remains that neither had been fixed, nor properly could be, without the order of that court, which presumably would not be entered without a proper hearing and showing. The record before us indicated that her services as executrix extended over a considerable period and involved handling numerous transactions and large sums of money, aggregating over $125,000, incident to closing out a merchandise business, collecting the accounts and paying the creditors, and as the court might in the exercise of a wise discretion allow for the executrix's compensation and counsel's fees a sum which with the unsettled liabilities might, when deducted from the amount in her hands, leave insufficient to pay any legacies whatever, we think the order was premature and should not have been entered.

REVERSED AND REMANDED.

Then when the entity was adopted, yet the fees remains any matter has been filed, nor actually could be, without the order of that court, which presumably would not be obtained without a proper hearing and showing. As the record before us indicated that her services in connection extended over a considerable period and involved handling numerous transactions and large sums of money, aggregating over $125,000, including to closing out a merchandise business, collecting the accounts and paying the creditors, and as the court might in the exercise of a wise discretion allow for the accountant's compensation and counsel's fees a sum which with the unpaid liabilities might, when deducted from the amount in her hands, leave insufficient to pay any legacies whatever, we think the order was premature and should not have been entered.

[illegible]

388 - 21375

WHITE BRASS CASTINGS COMPANY, Appellee, vs. AUTOMATIC RECORDING SAFE COMPANY, (Corp.), Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

193 I.A. 425

MR. JUSTICE BAGNES DELIVERED THE OPINION OF THE COURT.

~~Appellee~~, plaintiff ~~below~~, was a manufacturer of castings, and ~~Appellant~~, defendant ~~below~~, was engaged in selling "little household savings banks", called safes. Under arrangements between them the former manufactured the parts and assembled them, and sent monthly bills for the same which appear to have been paid regularly for over two years. ~~This suit was for the value of merchandise delivered and cash paid out in the last few months of their dealings.~~ Plaintiff claimed as due on account $6,193.92. Defendant claimed a set-off of over $13,000. The court's finding and judgment were in favor of plaintiff for $3,519.93.

This appeal brings up for review, the refusal of the court to allow three items of set-off, (1) one for $300, the cost of "fillers" made by plaintiff, and delivered and charged to defendant against its protest; (2) one for $528.67, the aggregate of an increased price of one half cent charged on safes made and furnished between October 1, 1912 and January 1, 1914; and (3) one for $10,285.92 being for what defendant called an overcharge for material delivered between April 1910 and September 1913.

Plaintiff at defendant's request made a written proposition in 1909 to manufacture the parts of the safe at

No. - STATE

WHITE PRIDE CANDIES COMPANY,
appellee,

vs.

[illegible],
appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

1921 A. 105

MR. JUSTICE PARKER DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff below, was a manufacturer of candies. Appellant, defendant below, was engaged in selling "little homeroll savings banks", called safes. Under arrangements between them the former manufactured the parts and assembled them, and sent monthly bills for the same which appear to have been paid regularly for over two years. This was for the value of merchandise delivered and usually paid out in the last few months of their dealings. Plaintiff claimed as due on account $6,193.92. Defendant claimed a set-off of over $13,000. The court's finding and judgment were in favor of plaintiff for $3,819.92.

This appeal brings up for review the refusal of the court to allow three items of set-off, (1) one for $800, the cost of "fillers" made by plaintiff, and delivered and charged to defendant against its protest; (2) one for $808.67, the aggregate of an increased price of one half cent charged on safes made and furnished between October 1, 1912 and January 1, 1914; and (3) one for $10,888.92 being for what defendant called an overcharge for material delivered between April 1912 and September 1918.

Plaintiff at defendant's request made a written proposition in 1909 to manufacture the parts of the safe at

certain specified prices which does not appear to have been acted on, defendant's secretary testifying that when it ~~got~~ became ready to arrange with plaintiff to do its business, the latter raised its price. There was a futile effort to hold plaintiff to its original proposition. But whether it had been accepted or not, plaintiff could withdraw it at any time and defendant was obligated only to the extent of goods actually ordered. The subject of changed prices became a matter of discussion and correspondence but the record shows ~~that~~ the goods were billed and accepted at the changed prices up to the close of the parties' dealings, and were ~~actually~~ paid for without protest up to the accruing of the account sued on. It is the difference between the prices contained in the proposition of 1909 and said changed prices for the material furnished that constitutes the so-called overcharges in the said third item.

The basis of defendant's contention with regard to said overcharges, - that it was induced to accept the changed prices from the necessity of its situation and misrepresentation by plaintiff as to the cost of manufacture, and that its payment of overcharges under such circumstances constituted payment under mistake of fact, - is wholly untenable. It was merely a question of contract. Plaintiff modified its proposition before acted on as it had a right to do. Defendant may have been embarrassed thereby just as it was ready to arrange for the output of its articles on the market. But at that time there was no agreement capable of enforcement against either party, and defendant was not obliged to accept plaintiff's new terms. If plaintiff drove a hard bargain and either took advantage of defendant's necessities or even misrepresented the cost of manufacture, defendant having given plaintiff orders on the basis of the new prices without

certain specified prices which does not appear to have been acted on, defendant's secretary testifying that when it was ready to arrange with plaintiff to do its business, the latter raised its price. There was a futile effort to hold plaintiff to its original proposition. But whether it had been accepted or not, plaintiff could withdraw it at any time and defendant was obligated only to the extent of goods actually ordered. The subject of changed prices became a matter of discussion and correspondence but the record shows that the goods were billed and accepted at the changed prices up to the close of the parties' dealings, and actually paid for without protest up to the accounting of the account sued on. It is the difference between the prices contained in the proposition of 1909 and said changed prices for the material furnished that constitutes the so-called overcharges in said third item.

The basis of defendant's contention with regard to said overcharges, - that it was induced to accept the changed prices from the necessity of its situation and misrepresentation by plaintiff as to the cost of manufacture, and that its payment of overcharges under such circumstances constituted payment under mistake of fact, - is wholly untenable. It was merely a question of contract. Plaintiff modified its proposition before acted on as it had a right to do. Defendant may have been embarrassed thereby just as it was ready to arrange for the output of its articles on the market. But at that time there was no agreement capable of enforcement against either party, and defendant was not obliged to accept plaintiff's new terms. If plaintiff drove a hard bargain and either took advantage of defendant's necessities or even misrepresented the cost of manufacture, defendant having given plaintiff orders on the basis of the new prices without

any binding conditions, and having paid for the goods billed according to such prices, it was in no position to question the validity of the contract or the rendered accounts so paid which by its acquiescence therein became stated accounts. The terms of the arrangement did not hold plaintiff to any specified cost of material. Hence, even though it induced defendant to accept prices on exaggerated statements of such cost so that it might realize a greater profit, in view of the fact that the actual arrangement between the parties was for specified prices to defendant, and not based on the cost of manufacture or of materials, there is no room for contention that there was a mistake of fact or for the application of the doctrine of the right to recover back money when paid under a mistake of fact. Hence the item for overcharges was properly disallowed, and evidence relating to the cost of material and manufacture was properly rejected.

As to the second item mentioned, that of increasing the price of each safe one half cent, such increase was required by plaintiff's letter of October 2, 1912 and accepted two days later by defendant, and defendant's secretary so admitted, saying "I accepted it because I had to." But neither party was obliged to continue the arrangement. The occasion for this raise was the increased cost of metal, and defendant had reason to believe that if there was a reduction of cost of metal former prices might be restored. But there was no binding contract to that effect. Hence, said item was properly disallowed.

As to the item of $300 for manufactured parts never ordered by defendant and which plaintiff had manufactured ahead in anticipation of orders, we find nothing in the contractual relations of the parties which obligated defendant to take or pay for them. There was no mutual obligation with

any binding conditions, and having paid for the goods billed according to such prices, it was in no position to question the validity of the contract or the rendered accounts as paid which by its acquiescence therein became stated accounts. The issue of the arrangement did not hold plaintiff in any specified sum of material. Hence, even should it become unknown to account prices on alleged statements of such cost so that it might realize a greater profit, in view of the fact that the actual arrangement between the parties was for specified prices to defendant, and not based on the cost of manufacture or of materials, there is no room for contention that there was a mistake of fact or for the application of the doctrine of the right to recover back money when paid under a mistake of fact. Hence the item for overcharges was properly disallowed, and evidence relating to the cost of material and manufacture was properly rejected.

As to the second item mentioned, that of increasing the price of each safe one half cent, such increase was required by plaintiff's letter of October 3, 1921 and accepted two days later by defendant, and defendant's accountant so admitted, saying it accepted it because I had to." But neither party was obliged to continue the arrangement. The occasion for this raise was the increased cost of metal, and defendant had reason to believe that if there was a reduction of cost of metal former prices might be restored. But there was no binding contract to that effect. Hence, said item was properly disallowed.

As to the item of $200 for manufactured parts never related by defendant and which plaintiff had manufactured based on anticipating of orders, or just preparing in the instructions relations of the parties which originated between them year for them. There was no mutual obligation with

respect thereto. Defendant could not compel their delivery nor plaintiff their acceptance. In the absence of any arrangement express or implied as to a surplus of manufactured articles or for defendant to take a certain quantity or more articles than it ordered, plaintiff took the risk of making more than defendant saw fit to order.

We should enter the judgment that should have been entered below - the trial being without a jury - which requires a reversal of the judgment and entry of one here for the same party for an amount $300 less, each party to pay his own costs.

REVERSED AND JUDGMENT FOR APPELLEE FOR $3219.93.

respect thereto. Defendant could not compel their military nor plaintiff their attendance. In the absence of any agreement express or implied as to a surplus of manufactured articles or for defendant to take a certain quantity or more articles than it ordered, plaintiff took the risk of making more than defendant saw fit to order.

We should enter the judgment that should have been entered below - the trial being without a jury - which requires a reversal of the judgment and entry of one here for the same party for an amount $20.00 less, each party to pay his own costs.

REVERSED AND JUDGMENT FOR APPELLANT FOR $2010.00.

229 - 21624

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
THOMAS LYONS, Plaintiff in Error.	

193 I.A. 431

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

~~Plaintiff in error~~ Defendant was charged on information with larceny of "one United States of America Treasury Note of the denomination of five dollars of the value of five dollars." On trial before a jury he was found guilty as charged in the information, on the evidence of the prosecuting witness that the property taken from him was "a five dollar bill," without further evidence specifying its kind or character, or even whether the bill of that denomination was money of the United States or some other country. Such evidence presents not a mere question of variance, as contended by counsel for the People, but a failure to prove an essential averment of the declaration. The law on this subject admits of no discussion. It is fundamental. (People v. Hunt, 251 Ill. 446; Vale v. People, 161 id. 309; Williams v. People, 101 id. 382; Lory v. People, 229 id. 268.)

The judgment will be reversed and case remanded for error in overruling the motion for a new trial.

REVERSED AND REMANDED.

556 - 20890

DUANE J. BABCOCK et al.,
Appellees,

vs.

WILLIAM C. REGELIN et al.,
Appellants.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

198 I.A. 432

STATEMENT OF THE CASE. This is an appeal from a judgment for $426.50, entered in the County Court of Cook County, against William C. Regelin and William Jenson, appellants, in favor of Duane J. Babcock and Grace Babcock, his wife, appellees.

Regelin, Jenson & Company, engaged in the real estate business in the city of Chicago, ~~hereinafter referred to as Regelin and Jenson~~, through M. F. McInnon, a salesman employed by them, sold to a certain Wallquist, a janitor in their employ, a farm situated in Kent County, Michigan, owned by appellees. Regelin and Jenson represented Wallquist and no commissions or other compensation for services therein rendered by Regelin and Jensen was paid by either of appellees. Wallquist, as a part of the purchase price, gave to appellees his promissory note for $750, dated January 23, 1912, bearing interest at 6% per annum, secured by a mortgage upon the said farm. The negotiations in relation to the sale in question were concluded in the office of Regelin and Jenson. Duane J. Babcock, ~~one of the appellees~~, testified that at that time he was introduced by McInnon, to Mr. Jenson, ~~one of the appellants~~; that the latter said to the witness, "If you have any more dealings, we would be glad to have you come in, any legal transactions, come into our office, * * ".

About a year later, Wallquist having defaulted

in his interest payments, Mrs. Babcock, one of the appellees, called at the office of Regelin and Jenson, met Mr. McKinnon and asked him to direct her to a good lawyer and testified that McKinnon replied, "What do you want a lawyer for, we do that kind of business right here?" In February, 1913, Duane J. Babcock called at the office of Regelin and Jenson, relative to the collection of the interest on the Wallquist mortgage and testified that he then and there said to McKinnon that Jensen had told him that if he "had any trouble or wanted any legal advice, to come to that office"; that McKinnon told him that Wallquist was still working for Regelin and Jenson; and that they could arrange to collect the interest from Wallquist. Later and during the same month, Duane Babcock further testified that in response to a telephone call from McKinnon, he went to Regelin and Jenson's office and was there informed by McKinnon, that Regelin and Jenson had obtained a loan from Wallquist of $1500 on the farm in question, and would pay ~~appellees~~ plaintiffs the amount due them on the mortgage if the witness would come to Regelin and Jenson's office with his wife, and endorse the mortgage and note for collection, which ~~appellees~~ plaintiffs did on the succeeding day. On this occasion neither of ~~appellees~~ plaintiffs saw or talked with any one except McKinnon, while in said office, nor had talked with either of ~~appellants~~ defendants relative to collecting, through them, the note and mortgage in question.

McKinnon testified that he told ~~appellant~~ defendant, Jensen, he had a mortgage on the farm in Michigan and asked Jenson if he, McKinnon, could put it through Jenson's bank for collection, but did not mention the name of the parties to the mortgage. Having obtained Jenson's consent, the mortgage and note in question were placed by McKinnon with Foreman Bros. Banking Co., Chicago, for collection. McKinnon testified he

did not remember whether he instructed the bank to credit the personal account of Jenson, or the firm account of Regelin and Jenson, with the proceeds of such note and mortgage, when collected. Jenson testified that McKinnon informed him that the mortgage in question belonged to McKinnon's wife and family. McKinnon, however, stated that he did not tell Jenson that it was a family mortgage. McKinnon was connected, remotely, by marriage with Mrs. Babcock, who testified that she had not previously seen McKinnon since she was a child, and did not recognize him when she saw him in Michigan, at the time of the negotiations for the sale of their farm. Jenson testified that when the bank called him up and informed him that they had collected a mortgage and wanted to know what to do with it, Jenson informed the bank that he would refer the matter to McKinnon. He stated that the mortgage was credited to his personal account, and that he drew checks against it, payable to the order of McKinnon and the latter's wife, respectively, which checks were delivered to McKinnon and cashed by Regelin and Jenson, and the money paid to McKinnon therefor, in their office. The checks referred to, three in number, were in the aggregate sum of $735.25. Regelin and Jenson had no other collection at the bank at that time. Jenson testified that McKinnon was then indebted to the firm in a sum ranging from $250.00 to $300.00. On May 24, 1915, McKinnon paid to Duane J. Babcock, one of the ~~appellees~~, $400.00 on account of the proceeds of the note and mortgage in question, and, thereupon, Babcock gave him a receipt as follows:

did not remember whether he instructed the bank to credit the personal account of Jensen, or the firm account of Kegelin and Jensen, with the proceeds of the note and mortgage, when collected. Jensen testified that Kallimon informed him that the mortgage in question belonged to Kallimon's wife and family. Kallimon, however, stated that he did not tell Jensen that it was a family mortgage. Kallimon was connected, remotely, by marriage with Mrs. Jensen, who testified that she had not previously seen Kallimon since she was a child, and did not recognize him when she saw him in Chicago, at the time of the negotiations for the sale of their firm. Jensen testified that when the bank called him up and informed him that they had collected a mortgage and wanted to know what to do with it, Jensen informed the bank that he would refer the matter to Kallimon. He stated that the mortgage was credited to his personal account, and that he drew checks against it, payable to the order of Kallimon and the latter's wife, respectively, which checks were delivered to Kallimon and cashed by Kegelin and Jensen, and the money paid to Kallimon therefor, in their office. The checks referred to, three in number, were in the aggregate sum of $723.15. Kegelin and Jensen had no other collection at the bank at that time. Jensen testified that Kallimon was then indebted to the firm in a sum ranging from $200.00 to $300.00. On May 24, 1915, Kallimon paid to Emma J. Jensen, one of the appellees, $400.00 on account of the proceeds of the note and mortgage in question, and, thereupon, appellee gave him a receipt as follows:

"$400.00 Chicago, May 24, 1913.
Received from H. P. McKinnon
Four hundred dollars
to be deducted from collection of note for
750.00 being mortgage on farm in Lent Co. Mich.
Duane J. Babcock."

McKinnon informed appellees at that time, according to appellees testimony, that such payment was in the nature of an advance, and that Wallquist had not at that time paid the mortgage and note in question. No further part of the money collected on said note and mortgage has ever been received by either of appellees, who made repeated demands upon McKinnon, and later upon Jenson, for the unpaid balance of the moneys collected.

During the summer of 1913, Mrs. Babcock called at the office of Regelin and Jenson, where she met Jenson and testified that she informed him that she was there to learn if the money upon the mortgage had been received, and that Jenson asked "What mortgage?" that Mrs. Babcock replied, "The Wallquist mortgage you are collecting for us," that Jenson upon an examination of the firm books told her that the mortgage had been collected during the spring and that McKinnon received the money through the office of Regelin and Jenson. A short time thereafter, Duane J. Babcock, her husband, called at the office of Regelin and Jenson, and there saw Jenson, and testified that he told Jenson that he wanted the money on the Wallquist mortgage; that Jenson said he knew nothing about the mortgage and then, upon looking at the firm books, Jenson further said, "Well, here is * * * the deal of the farm on the books, but I don't see nothing else," and he, Babcock, replied, "That is funny. I brought it in here to deal through you people because you said you could transact any business of that kind."

McKinnon continued in the employ of Regelin and Jenson until April, 1914, when, according to the testimony of

Jenson, McKinnon voluntarily terminated his employment. Upon cross-examination, Jenson was asked the following questions and made the following answers:

"Q. Isn't it a fact that you in answer to my question as to whether or not you had collected the money on this mortgage said you had not? Is that right or wrong?

A. I don't recollect just the conversation at that point.

Q. And after I told you that the bank President had informed me that you had collected that money then you did admit that you had collected it?

A. Well, you knew it then if you--

Q Yes, I knew it. And you did not tell me until after I told you that the bank president informed me that you had collected it.

A. I don't just recollect the conversation."

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The errors assigned by the appellants and relied on for a reversal of the judgment are, - the admission, by the court, of testimony in behalf of the appellees over the objection of appellants; improper conduct of counsel for appellees; improper and prejudicial remarks of the court, in the presence of the jury; the overruling of motion to find the issues for the appellants at the close of appellees' evidence, and again at the close of all of the evidence; the overruling of motion for a new trial, and that the verdict and judgment are excessive.

The main question arising out of the action of the trial court relates to the authority of a salesman of appellants to collect the proceeds of the note and mortgage of appellees.

Appellees never sustained any business relations with Regelin and Jenson, prior to the sale of the real estate in question. McKinnon and Jenson both testified that McKinnon

Jenson, Robinson voluntarily terminated his employment. Upon cross-examination, Jenson was asked the following questions and made the following answers:

"Q. Isn't it a fact that you in answer to my question as to whether or not you had filched the money on this occasion you had you had not. A. It was right or true.

Q. I don't remember just our conversation at that point.

Q. And after I told you that the bank officers had learned of the fact you then admitted that money that you had filched from you had collected it?

A. Well, you knew it then if you—

Q. Yes, I knew it. But you did not tell me until after I told you that the bank officers informed me that you had collected it.

A. I don't just recollect the conversation."

[illegible]

The office assigned by the appellate and trial courts for a reversal of the judgment are, - the admission, by the court, of testimony in behalf of the appellee over the objection of appellants; improper conduct of counsel for appellee; improper and inconsistent remarks of the court, in the presence of the jury; the overruling of motion to file the issues for the appellants as the close of appellees' evidence, and again at the close of all of the evidence; the overruling of motion for a new trial, and that the verdict and judgment are unsupported.

The main question arising out of the action of the trial court relates to the authority of a minorss of appellants to collect the proceeds of the site and mortgage of appellees.

Appellees never authorized any minorss relations with Jerome and Jenson, prior to the suit of the real estate [illegible]

had no express authority to buy or sell mortgages or collect money for Regelin and Jensen. It may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in that capacity, his authority to such other to so act for him will be presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority. (Mechem on Agency, vol. 1, 2nd ed., section 246; Stock Yard Co. v. Mallory, etc., Co. 157 Ill. 554, 565.) By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other, in the capacity of his agent. (Thurber & Co. v. Anderson, 88 Ill. 167, 169.)

We are of the opinion that appellees, under all the facts and circumstances in this case, were justified in presuming that Schinnon was authorized to act as the agent for Regelin and Jensen in the matter of collecting the proceeds of the note and mortgage in question. It was also for the jury to determine from all the facts and circumstances in evidence, whether appellant, Jenson, had knowledge that the proceeds of the note and mortgage in question belonged to appellees, before he paid $735.25 of such proceeds to Schinnon. No reason has been given why the residue of the principal sum, and the interest thereon, were retained by Jenson.

It is urged by appellants that it does not appear that William C. Regelin was jointly liable with William Jensen,

had no express authority to buy or sell merchandise or collect money for Hagelin and Jensen. It may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a certain capacity, or has knowingly and without dissent permitted such alleged agent to act in the manner in such capacity, his authority to such other to act for him will be presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the (real) or apparent scope of the presumed authority. (Reason on Agency, vol. 1, 2nd ed., section 268; Hawes Land Co. v. Pulsifer, supra, 107 Ill. App. 386.) By permitting another to hold himself out to the world as his agent, the principal assigns his best, and will be held bound to the person who gives credit therefrom to the extent of the apparent authority of his agent. (Hawkins & Co. v. Anderson, 3a Ill. 187, 193.)

As one of the underlying best principles, under all the facts and circumstances in this case, were justified in assuming that Jensen was authorized to act as the agent for Hagelin and Jensen in the matter of collecting the proceeds of the note and mortgage in question. It was also for the jury to determine from all the facts and circumstances in evidence, material important, [illegible] the presence of the [illegible] and [illegible] Jensen, [illegible] at [illegible] to [illegible] the [illegible] of the principal and the interest in Jensen, were replaced by Jensen.

It is urged by appellants that it does not appear that William C. Hagelin was jointly liable with William Jensen

and that, therefore, the verdict and judgment against the appellant, William C. Regelin, were not supported by any evidence. No affidavit denying joint liability was filed by appellants; but it is urged that there is no evidence tending to show that William C. Regelin was one of the members of the firm of Regelin and Jenson. Chapter 110, Sec. 54, Hurd's Revised Statutes, 1913, is as follows:

> "In actions upon contracts, express or implied, against two or more defendants, as partners or joint obligors or payors, whether so alleged or not, proof of the joint liability or partnership of the defendants, or their Christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar, denying the partnership, or joint liability, or the execution of the instrument sued upon, verified by affidavit."

There was no evidence offered by appellants to disprove joint liability. This court has held that the proper construction of the statute in question is that it relieves the plaintiff from the burden of proving joint liability, "in the first instance," and leaves the defendants at liberty to disprove it, without first denying it by plea. Bensley et al. v. Brockway, 27 Ill. App. 410, 413; Martin v. Nelson, 53 Ill. App. 517, 520.

It is urged by appellants that the court erred in admitting in evidence certain letters signed "Regelin, Jenson & Company, per R. F. McKinnon," because such letters were written more than a year prior to the time when appellees gave the note and mortgage to McKinnon for collection, and that such letters relate to the sale of the farm (which transaction was concluded in January, 1912), and therefore could not by any possibility be regarded as any evidence of McKinnon's authority to act as a collector for appellants or to represent them in any other capacity than that of salesman.

No question of McKinnon's authority to negotiate

was that, therefore, the verdict and judgment against the appellant, William C. Keegile, were not supported by any evidence. In affirmative defense, joint liability was filed by appellants; but it is urged that there is no evidence tending to show that William C. Keegile was one of the members of the firm of Keegile and Hansen. Chapter 126, Sec. 94, Laws's revised statutes, 1913, is as follows:

> "In actions upon contracts, express or implied, against two or more defendants, as partners or joint debtors or persons, whether so alleged or not, proof of the joint liability or partnership of the defendants, or that contribution or mutuality, shall not, in the first instance, be required to sustain the liability of the parties, unless such proof shall be required necessary by pleading in abatement, or unless the defendant shall file a plea in bar, denying the partnership, or joint liability, or the execution of the instrument sued upon, verified by affidavit."

There was no evidence offered by appellants to disprove joint liability. This court has held that the proper construction of the statute is "that if pleaded in bar, joint liability from all further of proving joint liability, 'as the first instance,' was leaves the defendants at liberty to disprove it, without first denying it by plea. Lumbery et al. v. Cudahy, 57 Ill. App. 416, 419; Martin v. Nelson, 50 Ill. App. 317, 320.

It is argued by appellants that the court erred in admitting in evidence certain letters signed "Keegile, Hansen & Company, per C. C." to William, "c-care our letters were written more than a year prior to the time appellees gave the note and mortgage to defendant for collection, and that letters relate to the sale of the firm (Keegile Hansen-Keegile was continued in business, 1913), and therefore could not by any possibility be admissible as any evidence of authority to act as a collector for appellants or to represent them in any other capacity than that of bailees.

such sale was raised on the trial and while such letters may not have been relevant or material to the issues, appellants could not have been prejudiced by their introduction as evidence.

Appellants also urge that there was no competent evidence that the note and mortgage in question had been given to McKinnon, nor that he had collected the money on same. McKinnon admitted upon the trial that he received such note and mortgage from appellees, sent same to the Grand Rapids Trust Company for collection, and upon the failure of the latter company so to do, placed same with Foreman Bros. Banking Company of Chicago, for collection.

Appellants' counsel assign as error improper remarks made by the court and appellees' counsel in the presence of the jury. There were no objections made by counsel to the remarks of the court complained of. In any event, the language of the court referred to did not constitute reversible error. Some of the remarks of appellees' counsel may be properly subject to criticism, but they are not of such a character as would warrant this court in reversing the case on that ground.

Appellants also complain that the verdict and judgment are excessive. The note and mortgage securing same were executed January 23, 1912. Appellees received $400.00 thereon on May 2, 1913. The jury were entitled to compute interest (a) upon the principal sum, up to May 2, 1913, and (b) upon the amount remaining due and unpaid, from that date. There was due appellees on May 23, 1914, when the verdict was returned, a sum in excess of $426.50, and, therefore, the verdict and judgment for such sum are not excessive.

We are of the opinion, upon a review of the entire record of this case, that no prejudicial error was committed, that substantial justice has been done, and that the judgment of the County Court should be affirmed.

JUDGMENT AFFIRMED.

68 - 21449

PEOPLE OF THE STATE OF ILLINOIS ex rel. TILLIE WOLF, Defendant in Error, vs. JOHN ZINZ, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

John Zinz, the defendant (plaintiff in error), was found guilty by a jury in the Municipal Court of Chicago, of being the father of the bastard child of Tillie Wolf, the relatrix, and judgment was entered on the verdict.

The only assignments of error argued by counsel for defendant are, - (a) improper and prejudicial conduct of the trial judge, (b) that the court erred in overruling a motion for a new trial, and (c) that the verdict is against the manifest weight of the evidence.

The child was born on December 23, 1914. The relatrix testified that she became pregnant during April, 1914, that she had sexual intercourse with defendant on the first Sunday of that month, and about four weeks prior thereto. Defendant testified that for a period of time prior to September 26, 1912, he sustained illicit relations with the relatrix, but did not see her thereafter until May 6, 1914, when he again had sexual intercourse with her. There is evidence in the record tending to corroborate the testimony of relatrix.

A prosecution for bastardy is not a criminal proceeding (The People v. Noxon, 40 Ill. 30) and it is only necessary to establish such case by a preponderance of the

PEOPLE OF THE STATE OF ILLINOIS ex rel. TILLIE WOLF, Defendant in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
JOHN ZINZ, Plaintiff in Error.	

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The only assignments of error argued by counsel for defendant are, - (a) improper and prejudicial conduct of the trial judge, (b) that the court erred in overruling a motion for a new trial, and (c) that the verdict is against the manifest weight of the evidence.

The child was born on December 29, 1914. The relatrix testified that she became pregnant during April, 1914, that she had sexual intercourse with defendant on the first Sunday of that month, and about four weeks prior thereto. Defendant testified that for a period of time prior to September 26, 1912, he sustained illicit relations with the relatrix, but did not see her thereafter until May 6, 1914, when he again had sexual intercourse with her. There is evidence in the record tending to corroborate the testimony of relatrix.

A prosecution for bastardy is not a criminal proceeding (The People v. Moxon, 10 Ill. 30) and it is only necessary to establish such case by a preponderance of the

evidence.

Upon a careful consideration of the entire record, we are unable to say that the verdict is against the manifest weight of the evidence, or that the conduct of the trial judge complained of was such as to arouse the passion or prejudice of the jury.

It is also argued by defendant's counsel that the court erred in overruling a motion for a new trial on the ground of newly discovered evidence. Such evidence was known to the defendant before the trial, and no explanation given by him to explain his failure to offer such evidence during the trial.

We are unable to say that substantial justice has not been done, and are of the opinion that the judgment of the Municipal Court should be affirmed.

JUDGMENT AFFIRMED.

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We are unable to say that substantial justice has not been done, and are of the opinion that the judgment of the Municipal Court should be affirmed.

JUDGMENT AFFIRMED.

202 - 21596

PEOPLE ex rel. ANNIE JORCZIK,
Defendant in Error,

vs.

GEORGE GARINES,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

193 I.A. 435

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In this case the jury found that the relatrix, Anna Jorczik (unmarried), was on January 31, 1915, delivered of a bastard child, and that George Garines, defendant (plaintiff in error), was its father. A motion for a new trial was overruled, and judgment entered on the verdict.

It is urged by the defendant that the verdict is against the manifest weight of the evidence.

The relatrix testified on direct examination that she had coition with defendant, on several occasions, commencing June 11, 1914, while employed in a Chinese restaurant conducted by a certain Moy Ging. The defendant was employed as a cook in another restaurant on the first floor of the same building in which Moy Ging's restaurant was situated and continued in such employment during the remainder of that year.

Defendant testified that he first saw complainant the last of July, 1914, and commencing August 2, 1914, that he accompanied her on three occasions to various places of amusement. Defendant denied that he, at any time, had illicit relations with relatrix.

Moy Ging testified that he did not pay any attention as to whether the relatrix entered his employ in June or July, 1914, but, according to his best recollection, it was during the first two weeks of July. Two of defend-

IN BANC ex rel. ANNA JUNCKIN,
Defendant in error,

vs.

ROBERT MOORE,
Plaintiff in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1931A.435

MR. JUSTICE MCCUNTY DELIVERED THE OPINION OF THE COURT.

In this case the jury found that the relatrix, Anna Junckin (Committed), was an immoral woman, and that George Barnes, defendant (plaintiff in error), was the father. A motion for a new trial was overruled, and judgment entered on the verdict.

It is urged by the defendant that the verdict is against the manifest weight of the evidence.

The relatrix testified on direct examination that she had coition with defendant, on several occasions, commencing June 11, 1914, while employed in a Chinese restaurant conducted by a certain Hoy King. The defendant was employed as a cook in another restaurant on the first floor of the same building in which Hoy King's restaurant was situated and continued in such employment during the remainder of that year.

Defendant testified that he first saw complainant the last of July, 1914, and commencing August 2, 1914, that he accompanied her on three occasions to various places of amusement. Defendant admits that he, at her time, had illicit relations with relatrix.

Hoy King testified that he did not pay any attention as to whether the relatrix entered his employ in June or July, 1914, but, according to his best recollection, [illegible] two weeks of July. The [illegible] of defendant

ant's witnesses, co-employees, one of whom commenced work there June 24, 1914, the other July 23, 1914, testified that they first saw complainant during the last days of July, 1914. Doctor Leonard A. Wood, testified that he attended the relatrix during her accouchement, and that the child at birth was a normal child, weighing seven and one-half pounds, who took nourishment and commenced gaining weight from the time of its birth. The doctor further testified that the usual period of gestation is 280 days. There was no evidence offered tending to prove that the birth was premature. ~~It is manifest, that, even if the testimony of relatrix be accepted as true, the child must have been one of premature birth.~~ The burden was upon the relatrix to prove the paternity of the child. The case of relatrix rests entirely upon her unsupported evidence.

The denial of guilt by defendant is corroborated by the foregoing testimony of Doctor Wood, which strongly tends to show that the pregnancy of the relatrix occurred several weeks before she claims she formed the acquaintance of defendant and had coition with him. The evidence clearly preponderates in favor of the defendant as to the time he first met the relatrix.

In the cases of Haines v. The People, 82 Ill. 430, and Peterson v. The People, 74 Ill. App. 178, cited in support of relatrix contention, there was a conflict of evidence as to whether the birth was premature. There is no conflict of evidence upon that point in this case. In the instant case, where the testimony of the relatrix shows that the first act of intercourse with defendant was 233 days before the birth of the child, the burden is upon her to establish by a preponderance of the evidence, that the child begotten of

wife's witnesses, co-employees, one of whom commenced work there June 24, 1914, the other July 22, 1913, testified that they first saw complainant during the last days of July, 1914. Doctor Leonard A. Good, testifies that he attended the relatrix during her accouchement, and that the child at birth was a normal child, weighing seven and one-half pounds, who took nourishment and commenced gaining weight from the time of its birth. The doctor further testified that the usual period of gestation is 280 days. There was no evidence offered tending to prove that the birth was premature. If the contrary, that, even if the testimony of relatrix be accepted as true, the child must have been the of premature birth. The burden was upon the relatrix to prove the paternity of the child. The case of relatrix rests entirely upon her unsupported evidence.

The denial of guilt by defendant is corroborated by the foregoing testimony of Doctor Good, which strongly tends to show that the pregnancy of the relatrix commenced several weeks before she claims she issued the acquaintance of defendant and had coitus with him. The evidence clearly preponderates in favor of the defendant as to the time he first met the relatrix.

In the cases of Haines v. The People, 83 Ill. 620, and Peterson v. The People, 74 Ill. 196, cited in support of relatrix contention, there was a conflict of evidence as to whether the birth was premature. There is no conflict of evidence upon that point in this case. In the instant case, where the testimony of the relatrix shows that the first act of intercourse with defendant was 280 days before the birth of the child, the burden is upon her to establish by a preponderance of the evidence, that the child begotten of

such intercourse was of premature birth. Souchek v. Karr, (Neb.) 111 N. W. Rep. 150.

When we consider that the relatrix had the burden of establishing the paternity of the child by the greater weight of the evidence; that her case rests solely upon her own testimony; that defendant's denial seems as worthy of belief as her testimony, and that the medical testimony makes it very unlikely that this child was begotten at any of the times when defendant had an opportunity to have sexual intercourse with the relatrix, we are led to the conclusion that the ends of justice require another trial. Matteson v. The People, 122 Ill. App. 66, 70.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

such intercourse was of premature birth. Lincoln v. Hunt, (Ob.) 111 N. E. Rep. 1.

When we consider that the relatrix had the burden of establishing the paternity of the child by the greater weight of the evidence; that her sole proofs rely upon her own testimony; that defendant's denial as to her veracity of belief as her testimony, and that the medical testimony makes it very unlikely that this child was begotten at any of the times when defendant had an opportunity to have sexual intercourse with the relatrix, we are led to the conclusion that the ends of justice require another trial. Brisbane v. The People, 187 Ill. 192, 58, 70.

The judgment is reversed and the cause remanded.

(CONCURRING OPINION).

1 - 20771

ELLEN L. NORTON,
Defendant in Error,

vs.

W. J. FEER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 440

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, seeking by an action in forcible detainer to recover possession of a barn, had judgment. We are of the opinion that this judgment should not stand.

Plaintiff was the owner of a lot on which was a residence, No. 4352 Calumet avenue, and a barn. For some years she had occupied the entire premises as her home. In January, 1914, she made a written lease to defendant of premises described therein as "House known as 4352 Calumet Ave.," the term to commence May 1, 1914, and expire April 30, 1916. Several weeks before the term began defendant obtained from plaintiff permission to take immediate possession of the barn, and plaintiff removed her electric car therefrom and delivered the barn keys to defendant, who thereafter occupied it with his motor car. It also appears that at the request of plaintiff's agent the defendant paid an additional insurance premium which was required on account of the occupancy of the barn with a gasoline car. There are also provisions in the lease which indicate that all the buildings on the lot were included in the demised premises.

From these and other circumstances, including the character of the neighborhood, we hold that it was clearly shown to have been the understanding and intention

ELLEN L. MOTYL,
Defendant in Error,

vs.

J. D. FRANK,
Plaintiff in Error.

MOTION TO DISMISS DEBT
OF ERROR.

1985TJA-110

IN THE APPELLATE COURT OF ILLINOIS

DEFENDER THE DIVISION OF THE STATE.

Plaintiff, seeking by an action in Forcible Detainer to recover possession of a barn, had judgment. We are of the opinion that this judgment should not stand.

Plaintiff was the owner of a lot on which was a residence, No. 4838 Chalmet Avenue, and a barn. For some years she had occupied the entire premises as her home. In January, 1974, she made a written lease to defendant of premises described thereon as "House known as 4838 Chalmet Ave.," the term to commence May 1, 1974, and expire April 30, 1976. Several weeks before the term began defendant obtained from plaintiff permission to take immediate possession of the barn, and plaintiff removed her electric car therefrom and delivered the barn keys to defendant, who thereafter occupied it with his motor car. It also appears that at the request of plaintiff's agent the defendant paid an additional insurance premium which was required on account of the occupancy of the barn with a gasoline car. There are also provisions in the lease which indicate that all the buildings on the lot were included in the leased premises.

From these and other circumstances, including the observers of the neighborhood, we hold that it was clearly error to deny the counterclaim and judgment

of the parties that the premises demised should include the entire lot with all the buildings thereon. In Armstrong v Crilly, 51 Ill. App. 504, afterwards appearing in 152 Ill. 646, it is held that the demise of a house by a street number carries the premises of which the house is only the main or principal feature.

Defendant was rightfully in possession of the barn, and plaintiff cannot maintain her action. The judgment is reversed without remanding the cause.

REVERSED.

of the period that the Jewish Review should contain the entire law with all the holdings thereon. In *Jacobson v Kanity*, 81 Cal. App. 2d, afterwards appearing in 108 P.2d, 44, it is said that the damage of a house by a street number exceeds the premises of which the house is only the main or principal feature.

Defendant was rightfully in possession of the lot, and plaintiff cannot maintain her action. The judgment is reversed without remanding the cause.

(REVERSED).

9 - 21455

CLARA C. HENDRICKSON,
Defendant in Error,

vs.

OSCAR R. HENDRICKSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 442

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, the holder of a judgment note signed by defendant, had judgment for $354.00. Upon motion the court opened the judgment and gave leave to defendant to make a defense and testimony was heard by the court.

The making of the note by defendant, who was plaintiff's husband, and the delivery to her was not denied. Defendant contends that plaintiff was in ill health, and upon her saying "that she wanted something to protect her for her funeral expenses," he gave the note to her "to pacify her." On the other hand, plaintiff testified that the consideration for the note was money which she had loaned to the defendant. Her testimony was that she received no allowance from her husband for personal expenses, and during their married life she had worked for a time in a laundry, had kept roomers, that she had received from a daughter payment for board and washing, and that she kept an account of her own moneys in the State Bank of Chicago; that it was from her own money thus accumulated that she made the advances to her husband, who borrowed the money for the purpose of buying a lot. It also appears that when she was married she had something over $200 of her own. The husband, testifying, does not deny that he received this

[illegible]

[illegible] v. [illegible],
[illegible] in error.

vs.

[illegible] v. [illegible],
[illegible] in error.

[illegible] v. [illegible]
[illegible] of [illegible].

[illegible] 442

[illegible] JUDICIAL DISTRICT [illegible]

[illegible] THE [illegible] OF THE COURT.

[illegible], the mother of a [illegible] sign[illegible] defendant, has judgment for [illegible]. Upon motion the court opened the judgment and gave leave to defendant to make a defense and testimony was heard by the court.

The making of the note by defendant, who was plaintiff's husband, and the delivery to her was not denied. Defendant contended that plaintiff was in ill health, and upon her saying "that she wished something to protect her for her funeral expenses," he gave her note to her "to pacify her." On the other hand, plaintiff testified that the consideration for the note was money which she had loaned to the defendant. Her testimony was that she received no allowance from her husband for personal expenses, and during their married life she had worked for a time in a laundry, had kept roomers, had she had received from a daughter payment for board and washing, she then she kept an account of her own money in the black book of [illegible] that it was from her own money that she accumulated that she made the advances to her husband, who borrowed the money for the purpose of [illegible] a lot. It also appeared that when she married she had something over [illegible] of her own. The husband, testifying, does not deny that he received this

money from his wife, and the evidence clearly shows that the amount of the note represents only a portion of the advances made by plaintiff to defendant.

Under these circumstances plaintiff was entitled to maintain her action against her husband. The statute entitled "Husband and Wife," chapter 68, secs. 1 and 2, Hurd's Illinois, in force July 1, 1874, has been construed to authorize a husband or wife to sue the other on all contracts except for services rendered to each other. Thomas v. Mueller, 106 Ill. 36; Hamilton v. Hamilton, 89 Ill. 349; Crum v. Sawyer, 132 Ill. 443. The contention of defendant in this court is based upon the statute in force prior to the enactment of the present statute, and is unavailing.

The judgment is affirmed.

AFFIRMED.

- ney from his wife, was the evidence clearly showed that the amount of the note represents only a portion of the advances made by plaintiff to defendant.

Under these circumstances plaintiff was entitled to maintain her action against her husband. The statute entitled "husband and wife," chapter 68, secs. 1 and 2, Nevada Compiled Laws, in force July 1, 1874, has been construed to authorize a husband or wife to sue the other on all contracts except for services rendered to each other. Thomas v. Smallen, 108 Ill. 36; Hamilton v. Hamilton, 60 Ill. 349; Cline v. Barrett, 108 Ill. 442. The construction of defendant in this court is based upon the statute in force prior to the enactment of the present statute, and is unavailing.

The judgment is affirmed.

AFFIRMED.

16 - 21552

LILA McDERMOTT et al., heirs at law of Hannah M. Conroy, deceased, Defendants in error, vs. DONALD K. HOOPS, Plaintiff in error.	Error to Municipal Court of Chicago.

198 I.A. 444

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Hannah M. Conroy, now deceased, made a lease in writing to defendant of premises known as 4519 Indiana avenue, for a term commencing September 1, 1913, and ending April 30, 1914, at a monthly rental of $50. The heirs of Mrs. Conroy brought suit claiming that rent for the last four months of the term had not been paid. Upon trial by the court the plaintiffs had judgment for $200.

Defendant argued that the heirs are not the proper parties plaintiff, that suit should have been brought by the administrator. This contention is without merit. Upon the death of Mrs. Conroy in December, 1913, the real property passed to her heirs, and thereafter they were entitled to collect the rent; the administrator had nothing to do with this. This is so elementary that citations of decisions are unnecessary.

Some defense is attempted based upon the concession made at the trial that if the defendant were present he would testify to the poor condition of the heating apparatus in the house and to other matters set out in his affidavit of defense. While conceding that he would so testify, counsel for plaintiffs object to his competency as a witness, on the ground that under the statute, chapter 51, sec. 2, on evidence and

Depositions, he would not be permitted to testify. This objection is valid, and the trial court so held. It is true that an interested party may testify to facts occurring after the death of a person. These facts are claimed to be that defendant removed from the premises with the consent of one Coleman, who had been the agent of Mrs. Conroy. There is no testimony to this effect, and even if we should consider the affidavit of defense as testimony it discloses no authority in Coleman to act on behalf of plaintiffs in any way whatever, and certainly no authority to release defendant from rent.

The contentions made by defendant's counsel are unconvincing, and the judgment is affirmed.

AFFIRMED.

32 - 21652

WILLIAM F. SCHUMAN,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

Error to
Circuit Court,
Cook County.

198 I.A. 447

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff broughtsuit alleging that while he was alighting from one of defendant's cars, through negligence it was suddenly started, throwing him to the ground and injuring him. Upon trial the jury returned a verdict of not guilty upon which judgment was entered.

Plaintiff says the verdict was against the weight of the evidence. We do not think so. The jury reasonably could believe that about ten o'clock in the evening plaintiff and his son, a young man nineteen years old, were passengers on a northbound North Clark street car; that they lived on the north side of Fullerton avenue, just west of Clark; that when the car neared Fullerton avenue it stopped at the south side of the street to allow plaintiff and his son to alight; the son alighted first from the easterly door of the front platform, then turned northwesterly across the track in front of the car; plaintiff following, started to turn to follow his son diagonally in the direction of their home, and either twisted his leg and fell as he made the turn, or slipped on the rail of the track. There was abundance of testimony that the car made only one stop for plaintiff to alight, and remained standing still until some time after the accident occurred. We would not be justified in disturbing the verdict of the jury.

It is said that it was reversible error for the court to instruct the jury touching contributory negligence, as the evidence shows there was no contributory negligence in the case. The instruction is a correct statement of the law, and we do not believe it can be said with accuracy that there is no question whatever of contributory negligence in a case of this kind. By instruction No. 2 given at plaintiff's request, the jury were properly told that before plaintiff could recover he must be in the exercise of ordinary care for his own safety. Plaintiff cannot now complain of the instruction on the same point given at the request of defendant. Harney v. Sanitary District, 260 Ill. 54; West Chicago St. R. Co. v. Buckley, 200 Ill. 260.

There being no convincing reason to set aside the judgment it is affirmed.

AFFIRMED.

57 - 21795

PEOPLE ex rel. HARRY H. HAMMERSCHLEG,
Defendant in Error,

vs.

CITY OF CHICAGO et al.,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

193 I.A. 451

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition, amended, for a writ of mandamus to compel the City of Chicago, the civil service commissioners, the fire marshall and the city comptroller to place his name on the roster of the fire department and upon the fire department payroll of the City of Chicago as a pipeman, with the right to enter upon his duties as pipeman and receive the salary therefor as he had prior to his removal from the service on or about July 25, 1908. To this amended petition a general demurrer was filed and overruled. Respondents elected to stand by the demurrer, and judgment was rendered that a writ of mandamus issue.

Petitioner has not appeared in this court.

This court has had occasion several times to consider petitions of this kind, notably in the recent cases of People ex rel. Mickland v. City, No. 20699, opinion filed October 6, 1915, and Vaughn v. City, No. 21089, opinion filed February 15, 1916. See, also, opinion of this court in Rudnick v. City, No. 20897, this day filed. The form of the petition before us is similar to the petitions considered in these cases, and what is said in those opinions is applicable to the instant case. It has been many

PEOPLE ex rel. ALBERT
L. [illegible],
Defendant in Error,

vs.

CITY OF CHICAGO et al.,
Plaintiffs in Error.

E. [illegible] TH [illegible] ALBERT,
[illegible] ROBERT.

MR. PRESIDING JUSTICE [illegible]
DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition, amended, for a writ of mandamus to compel the City of Chicago, the civil service commissioners, the fire marshall and the city comptroller to place his name on the roster of the fire department and upon the fire department payroll of the City of Chicago as a plowman, with the right to enter upon his duties as plowman and receive the salary therefor as he had prior to his removal from the service on or about July 25, 1904. To this amended petition a general demurrer was filed and overruled. Respondents elected to stand by the demurrer, and judgment was rendered that a writ of mandamus issue.

Petitioner has not appeared in this court.

This court has had occasion several times to consider petitions of this kind, notably in the recent cases of People ex rel. Hopkins v. City, No. 20255, opinion filed February 15, 1906, and People v. City, No. 20255, opinion filed February 15, 1906. See, also, opinion of this court in Rudolph v. City, No. 20257, this day filed. The form of the petition before us is similar to the petitions considered in these cases, and what is said in those opinions is applicable to the instant case. It has been many

times decided that a writ of mandamus will not issue unless the party applying for it shows a right which is clear and undeniable. People v. Busse, 248 Ill. 11.

In the case before us the petitioner has failed to plead any ordinance creating the office of pipeman. It is alleged that an ordinance was passed creating "an executive department of the municipal government * * which shall be known as the fire department and shall include one fire marshall * * and such number of * * pipemen * * and employes as the city council may by ordinance provide." It is clear that this contemplates an ordinance by the city establishing the number of pipemen in the fire department, but petitioner has not pleaded any such ordinance, and discloses in no way when or how the city council provided for any number of pipemen. This is not sufficient. Kenneally v. City, 2[illegible] Ill. 485, and also the numerous cases cited in the opinions in the cases first referred to.

The fact that the civil service commission establishes a classification of offices and places of employment does not establish the office itself. Bullis v. City, 235 Ill. 472.

It also should be noted that under the civil service rules and the Civil Service Act original appointments shall be on probation for a period of six months, and that if any probationer, upon a fair test, shall be found incompetent or unqualified to perform the duties of the position, the appointing officer shall so certify to the commission, and the head of the department may, with the consent of the commission, discharge him upon assigning in writing his reasons. The petitioner alleges his discharge by Chief Horan, but fails to allege in what manner the chief did not comply with these provisions of the civil service rules and the Civil

times decided that a vote of condemnation will not issue unless the party applying for it shows a right which is clear and undeniable. Lewis v. Lewis, 244 Ill. 11.

In one case before us the petitioner has failed to plead any grievance creating the effect of injunction. It is alleged that an ordinance was passed creating "an executive department of the municipal government - a police merit be known as the fire department and shall include the fire marshall + + and such number of + + firemen + + and employees as the city council may by ordinance provide." It is clear that this contemplates an ordinance by the city establishing the number of firemen in the fire department, but petitioner has not pleaded any such ordinance, and discloses in no way when or for the city council provided for any number of firemen. This is not sufficient. Kerchofsky v. City, 244 Ill. 488, was also the numerous cases cited in the opinions in the cases first referred to.

The fact that the civil service commission establishes a classification of offices and places of employment does not establish the official fiscal. Smith v. City, 244 Ill. 271.

It also should be noted that under the civil service rules and the civil service act original appointments shall be on probation for a period of six months, and that if any probationer, upon a fair test, shall be found incompetent or unqualified to perform the duties of the position, the appointing officer shall [illegible] and the [illegible] of the commission, viz. the consent of the commission, discharge him upon assigning in writing his reasons. The petitioner alleges his discharge by chief Horan, but fails to allege he was never the chief and not comply with these provisions of the civil service rules and the civil

Service Act. From anything that appears to the contrary from the petition, the petitioner failed to give satisfaction while on probation and was legally discharged.

For the reasons above indicated the judgment of the Superior Court of Cook County is reversed and the cause remanded with instructions to sustain the demurrer and dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

424 - 21822

MATENSZ OZECH,
Appellee,

vs.

INTERNATIONAL HARVESTER
COMPANY OF NEW JERSEY,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, employed by defendant, was injured through an explosion in a small foundry connected with defendant's plant. He brought suit and had a verdict and judgment for $1,250.

The cupola or furnace in the foundry was cylindrical in shape, four feet in diameter, resting on four legs which were about five feet high, standing on a concrete foundation. The upper part of the cupola extended through the roof. The bottom consisted of two semi-circular steel doors which when closed were kept in place by two steel props; when closed the contents of the cupola were retained; when open the contents dropped out. The cupola was loaded with alternate layers of iron and coke from a second floor, which was called the charging platform. Occasionally the iron in the cupola did not melt to the proper consistency. When this happened it was necessary to open the bottom doors and allow the mass to drop out; otherwise it would grow cold and solidify, and then could not be removed without destroying the cupola.

Upon this occasion the iron was not sufficiently molten, and the foreman concluded to empty the cupola. As the operation is attended with danger, he first ordered the -

MATTHEW DEACON,
Appellee,

vs.

THE BOSTONIAN MANUFACTURING COMPANY,
Appellant.

MR. SPECIALIST JUSTICE MORGAN:

DELIVERED THE OPINION OF THE COURT.

Plaintiff, employed by defendant, was injured through an explosion in a small foundry connected with defendant's plant. He brought suit and had a verdict and judgment for $1,250.

The cupola or furnace in the foundry was cylindrical in shape, four feet in diameter, resting on four legs which were about five feet high, resting on a concrete foundation. The upper part of the cupola extended through the roof. The bottom consisted of two semi-circular steel doors which when closed were kept in place by two steel props; when closed the contents of the cupola were retained; when open the contents dropped out. The cupola was loaded with alternate layers of iron and coke from a second floor, which was called the charging platform. Occasionally the iron in the cupola did not melt to the proper consistency. When this happened it was necessary to open the bottom doors and allow the mass to drop out; otherwise it would grow cold and solidify, and then could not be removed without injuring the cupola.

Upon this occasion the iron was not sufficiently molten, and the foreman continued to supply the cupola. As the operation is attended with danger, he first ordered the

laborers, including plaintiff, who was on the charging platform, to leave the building, and then directed a man, called the cupola tender, to open the bottom doors. This man, with a long rod, knocked out the props, the doors swung open, and the mass of iron in varying stages of liquefaction, with coke in various stages of combustion, dropped upon the foundation under the cupola. What is described as a terrific explosion" ensued. Parts of the brick walls of the foundry were demolished and the building practically wrecked. Three men were killed. Plaintiff says that upon receiving orders to leave the building he went from the charging platform by an elevator and had reached the ground floor and "was hardly able to take a step" when the explosion occurred. He was blown through the doors and underneath a freight car standing about fifteen feet from the building. Some witnesses placed plaintiff just outside the building at the instant of the explosion.

~~What caused the explosion?~~ Plaintiff alleged and introduced evidence tending to prove that the hot contents of the cupola fell into water or on a damp place present around the legs of the cupola, and witnesses testified that this contact of molten iron with water not in sufficient quantity to cover it would cause an explosion. Defendant ascribed the explosion to a rush of gas into a "pocket" formed by a partition and the floor of the charging platform, and the ignition of this gas by the hot metal and the flaming coke. Defendant argued that its explanation ~~is~~ established by the greater weight of the evidence, and therefore plaintiff's allegations as laid in his declaration have failed of proof, and hence he ~~cannot~~ could not recover. The conflicting testimony of the witnesses as to the presence,

laboratory, including plaintiff, was on the carrying platform, to leave the building, and then directed a man, called the cupola tender, to open the kitchen doors. This man, with a long rod, knocked out the ropes, the doors swung open, and the mass of iron in varying stages of liquefaction, with coke in various stages of combustion, dropped upon the foundation under the cupola. Most of descriptions were terrific explosions" caused. Parts of the brick walls of the foundry were demolished and the building practically wrecked. Three men were killed. Plaintiff says that upon receiving orders to leave the building he went from the emerging platform by an elevator and had reached the ground floor and "was barely able to take a step" when the explosion occurred. He was blown through the doors and underneath a freight car standing about fifteen feet from the building. Some witnesses place plaintiff just outside the building at the instant of the explosion.

Plaintiff alleged and introduced evidence tending to prove that the hot contents of the cupola fell into water or on a damp place present around the legs of the cupola, and witnesses testified that this contact of molten iron with water not in sufficient quantity to cover it would cause an explosion. Defendant ascribes the explosion to a train of gas into a "pocket" formed by a partition and the floor of the charging platform, and the ignition of this gas by the hot metal and the flaming coke. Defendant argues that the explanation is established by the greater weight of the evidence, and therefore plaintiff's allegations as laid in his declaration have failed of proof, and hence he cannot recover. The conflicting testimony of the witnesses as to the presence

quantity and exact location of water on the ground around or under the cupola, and the variant views of witnesses concerning the respective causal theories of the explosion, were properly presented to the jury. We are of the opinion that the jury reasonably could find that the plaintiff had proved his claim as to the cause of the explosion.

It should also be noted that at the defendant's request the following special interrogatory was given to the jury: "Was the explosion in question caused by the dumping of the cupola in water which was then and there under the cupola?" and to this the jury returned the answer "Yes." No motion was made by defendant to set aside this special finding, and there is no assignment of error in that regard. It has been repeatedly held that under such circumstances the defendant is conclusively bound by this finding. City of Aurora v. Rockabrand, 148 Ill. 399; Pennsylvania Coal Co. v. Kelly, 156 Ill. 9; Empire Laundry Machine Co. v. Brady, 164 Ill. 58; Farrell v. Illinois Tunnel Co., 177 Ill. App. 425.

Did plaintiff receive injuries which would justify a verdict and judgment for $1,250? Plaintiff's ad damnum in his declaration was laid at $25,000. We are not persuaded by the argument of counsel to believe that plaintiff received no injury of any kind. It would seem to be self evident that a person receiving upon his body the force of an explosion only a few feet away, which was sufficient in violence to wreck a brick building, must have received considerable shock. Physicians testified to the presence of dilation of the heart and injury to the kidneys. While at times plaintiff may have affected to be in more physical distress than warranted by the facts, we are not disposed, under all the circumstances, to consider the ver-

quantity and exact location of water on the ground around or under the cupola, and the various views of witnesses concerning the respective causal theories of the explosion, were properly presented to the jury. We are of the opinion that the jury reasonably could find that the plaintiff had proved his claim as to the cause of the explosion.

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Did plaintiff receive injuries which could justify a verdict and judgment for $1,250? Plaintiff's ad damnum in his declaration was laid at $25,000. We are not persuaded by the argument of counsel to believe that plaintiff received no injury of any kind. It would seem to be self evident that a person receiving upon his body the force of an explosion only a few feet away, which was sufficient in violence to wreck a brick building, must have received considerable shock. Hypothesis testified to the presence of dilation of the heart and injury to the kidneys. While at times plaintiff may have affected to be in more physical distress than warranted by the facts, we are not disposed, under all the circumstances, to consider the ver-

dict of $1,250 to be excessive.

The refusal of the court to give certain instructions at the request of defendant was not harmful in view of the specific finding by the jury as to the cause of the explosion.

Alleged improper remarks by counsel are not of sufficient seriousness to require a reversal under the facts of this case, but even if this were not true we could not consider this point as defendant has not assigned as error in this court any improper argument or conduct of counsel.

Holding as we do, that the verdict was not contrary to the weight of the evidence, and that the amount of the award is not unreasonable, the judgment is affirmed.

AFFIRMED.

sion of it, has to be excessive.

The refusal of the court to give certain instructions at the request of defendant was not harmful in view of the specific finding by the jury on in the cause of the exclusion.

Alleged improper remarks by counsel are not of sufficient seriousness to require a reversal under the facts of this case, but even if this were not true we could not consider this point as defendant has not assigned as error in this court any improper argument of counsel or counsel.

Nothing we do, that the verdict was not contrary to the weight of the evidence, and that the amount of the award is not unreasonable, the judgment is affirmed.

AFFIRMED.

72 - 21869.

JOHN P. KANE,
Appellee,

vs.

INDIANA HARBOR BELT
RAILROAD COMPANY,
Appellant.

Appeal from
Superior Court,
Cook County.

198 I.A. 458

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff while employed by defendant fell from a high platform and was injured. He brought suit alleging negligence of defendant in leaving crushed or slush ice on the platform, causing him to slip and fall. Upon trial by a jury he had a verdict upon which judgment was entered for $1,000.

The jury could reasonably believe from the evidence that plaintiff was employed in and about an ice house and icing platform used for icing cars. The platform is about 760 feet long and 16 feet wide; it is a double-decker with a sheet-iron or tin roof; the upper deck is about 21 feet from the ground; at each end is a cluster of lights; under instructions these were lighted only when icing cars. Railroad tracks run parallel to this platform on both sides. Crushed ice is prepared in the ice house, then broughtover the platform to the cars; from the upper deck it is placed in cars carrying beef and poultry. One crew under a foreman does the work in daytime, and another crew at nighttime. Orders are given to each crew when the work is finished to clean up all spilt or loose ice. Instructions from the foreman were, "whenever there was any slush ice or solid ice spilt on the platform it must be immediately picked up, placed in a full car that might be standing along there; and if there was no full car standing there, throw it into one empty; if there was no empty car there, shovel it off on the ground, and don't allow it to lay on the platform." In February, 1912, when

the accident occurred, plaintiff did clerical work around the ice house, assisted the watchman and assisted the night crew in icing cars. Upon the night of the accident no cars were iced. Plaintiff was assisting the watchman, and in the performance of this duty he walked over the top platform at least three times during the night to pull the night watchman's clock; at these times he walked along the south side of the platform. On the next trip, which was his last, he walked along the north side, and stepped into slush or crushed ice which had been left there by the day crew. He did not know it was there, and on account of the darkness did not see it. It caused him to slip and he fell off the platform down to the railroad track, receiving severe injuries. Only once during the seven years he had worked there had he observed any slush ice left on the platform by the other crew; the instructions to remove this ice had been followed with only one exception for many years.

It does not seem unreasonable, in view of the great danger to workmen on this high platform, that ordinarily and usually great care would be exercised in keeping the platform free from loose ice, and that only rarely would there be an exception to this rule.

Did plaintiff assume the risk incident to the presence on the platform of crushed ice at this time? We think not. If the fact was, as the jury must have believed, that the presence of this ice at this time was an unusual and extraordinary occurrence, then plaintiff did not assume such risk. As we have before indicated, we cannot conclude that the jury should not have so found. This being true, plaintiff did not assume the risk of that which he did not know, or of that

which he was not chargeable with knowing.

The judgment is affirmed.

AFFIRMED.

95 - 22012

JOHN LANG and LOUISE LANG,
Appellees,

vs.

JAMES W. HEDENBERG,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

198 I.A. 470

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The issues in this case are practically identical with those involved in Summers v. Hedenberg, ante, page _____. The land involved in this case and that involved in the Summers case were parts of the same tract, which had been originally owned by Summers. In this case the defendant entered into a contract with the complainants for the purchase of the land involved ~~in this case,~~ herein and the purchase price of the land involved in this case was the same as that of the land involved in the Summers case. The two contracts contained the same provision as to deposits of the contract and earnest money with the Chicago Title and Trust Company and the right of the complainants to retain the earnest money if defendant failed to perform the contract on his part. Many of the questions involved in the two cases are identical and what was ~~laid in the Summers case need not be repeated here.~~ Ballot Court makes reference to such case in the present case. The abstract was delivered to defendant, who made no objection to the title. When the time for the payment of $4,000 arrived defendant, on repeated demands, failed to pay the money and also failed to pay the $5,000 when it fell due on the ground that he did not have the money. The master ~~properly~~ from the evidence concluded that the only reason that defendant did not make the payments was that he was unable to raise the money, as he never gave any other

The issues in this case are questionably immaterial with those involved in Smoots v. Heimbody, only that the land involved in this case and that involved in the Smoots case were parts of the same tract, which had been originally owned by Smoots. In this case the defendant entered into a contract with the complainants for the purchase of the land involved in this case, the instrument prior of the land involved in this case was the same as that of the land involved in the Smoots case, the two contracts contained the same provision as to payments of the purchase and interest money with the Chicago Title and Trust Company and the right of the complainants to retain our mortgage money if defendant failed to perform the contract on his part. Many of the questions involved in the two cases are identical and the same in the Smoots case need not be repeated here.

The abstract was delivered to defendant, who made no objection to the title. When the time for the payment of $4,000 arrived defendant, on tendered Smoots, failed to pay the money and also failed to pay the $4,000 when it fell due on the ground that a old tax line exists. The entire testimony from the evidence contained that the only reason that defendant did not make the payments was that he was unable to raise the money, he never had any other

reason nor made any objection to the title of appellees. A notice similar to that given in the Summers case was given by complainants to defendant April 13, and, defendant having failed to make any payments, complainants caused defendant to be served with another notice that on account of his failure to perform the provisions of the contract, make the payments necessary and comply with said first notice, they had elected to declare the contract null and void and to retain the purchase money. May 29, 1914, defendant filed in the Recorder's office an affidavit similar to the affidavit filed in the Summers case. He never made payment of either the $4,000 or the $5,000 to the Chicago Title and Trust Company nor offered to do so. No argument was made before the Master of any defect in complainants' title and no argument on this question was made before the Court on exceptions to the Master's report. It ~~is~~ was argued for the first time in this Court. The grounds of reversal urged ~~are~~ were: First, that complainants were in default at the time of the service of the notice of April 13, 1914, and were not entitled to forfeit and retain the earnest money, because there was no proof that at the time of the service of the notice they had perfect title to the property. Second, that complainants did not tender a deed nor prescribe the form of trust deed. Third, that the notice did not give a reasonable time for performance. Fourth, that a court of equity will not aid the complainants.

By basing his refusal to perform the contract on his inability to do so, defendant waived all other grounds of objection. Johnson v. Johnson, 43 Minn. 5. The contention of defendant that complainants agreed to give him additional time for the payment of the purchase price is not supported

reason nor made any objection to the title of appellees. A notice similar to that given in the Omaha case was given by complainants to defendant April 13, and, defendant having failed to make any payments, complainants caused defendant to be served with another notice that on account of his failure to perform the provisions of the contract, unless the payments necessary were complied with said first notice, they had elected to declare the contract null and void and to retain the purchase money. May 23, 1913, defendant filed in the Recorder's office an affidavit similar to the affidavit filed in the Omaha case. He never made payment of either the $4,000 or the $3,000 to the Chicago title and Trust Company nor offered to do so. No argument was made before the master of any defect in complainants' title and no argument on this question was made before the court on exceptions to the master's report. It is argued for the first time in this court. The records of recorded deeds show, first, that complainants were in default at the time of the service of the notice of April 13, 1913, and were not entitled to forfeit and retain the earnest money, because there was no proof that at the time of the service of the notice they had perfect title to the property. Second, that complainants did not tender a deed nor prescribe the form of trust deed. Third, that the notice did not give a reasonable time for performance. Fourth, that a court of equity will not aid the complainants.

By paying his tribunal to perform the contract on his liability, to do so, plaintiff waives all right thereto or rejection. Jackson v. Johnson, 44 Ill. 4. The maintenance of defendant's complainants agreed to give the additional time for the payment of the purchase price is not supported

by the evidence and therefore cannot be made the basis of a claim of his right to a deed upon payment of the purchase price. The evidence shows that his refusal to perform was upon the sole ground that he did not have the money to make the payments within the prescribed time. In Ashbaugh v. Murphy, 90 Ill. 182, it was held that where a defective title is tendered and the conveyance is refused on the ground that the purchaser did not have the money, he could not object to the title, and the Court said:

> "Had he himself been ready to perform the contract and objected to the deed because the property was encumbered, the plaintiff might have been able to show that the property was freed from all encumbrance and the title perfect; but defendant makes no pretense that he was ready and able and willing to perform the contract."

To same effect is Runkle v. Johnson, 30 Ill.328. In Johnson v. Johnson, 43 Minn. 5, it was held that it was not important that there was a cloud on the title which could have been removed when the vendee stated that he could not get the money to perform. It was not necessary that complainants have title until the time they had agreed to deposit the deed in escrow, and before that time defendant had made default and could not require complainants to obtain title. The Master properly found from the evidence that Hedenberg made no objection to the title, but failed to carry out the agreement by reason only of his inability to provide the necessary money.

In Kissack v. Bourke, 224 Ill. 352, Bourke made a contract to sell to Kissack certain land provided Kissack deposited in a named bank the purchase price, which should be delivered to Bourke upon receipt of a deed from him. An abstract was delivered which showed a defective title. The time in which the transaction was to be closed was extended thirty days. Kissack offered to pay the balance and take a

by the evidence and therefore cannot be made the basis of a claim of his right to a dead man's payment of the purchase price. The evidence seems that his refusal to perform was upon the sole ground that he did not have the money to make the payments within the prescribed time. In Lambkin v. Hartley, 90 ill. 164, it was held that where a defective title is tendered and the conveyancer is referred to the ground that the purchaser did not have the money, he could not object to the title, and the court said:

> "He on himself been ready to perform the contract and objected to the deed because the property was encumbered, the plaintiff might have been able to show that the property was freed from all encumbrance and the title perfect; but defendant makes no pretense that he was ready and able and willing to perform the contract."

To same effect is Jones v. Hibbard, 6 ill. App.

In Johnson v. Lambden, 43 Ill. 5, it was held that it was not important that there was a cloud on the title which could have been removed when the vendee ready too. He could not get the money to perform. It was not necessary that purchasers have title until the time they had agreed to deposit the deed in escrow, and before that time defendant had made default and could not require complainants to obtain title. The latter properly found from the evidence that defendant made no objection to the title, but failed to money, not the agreement by reason only of his inability to furnish the necessary money.

In Lawson v. Tonkin, 224 ill. 224, there was a contract to sell to Lawson certain land providing Lawson deposited in a bank back the purchase price, which could be delivered to Tonkin upon receipt of a deed from him. Lawson had initiated suits against a mortgagee title. The time in which the transaction was to be closed was extended until July. Lawson offered to pay the fifteen and take a

warranty deed, or to deposit the money in the bank if Bourke would make the deed, which he refused to do unless he was paid a larger sum. The Court said:

> "We are of the opinion that the deposit of the balance of said purchase price in said bank was a condition precedent to appellant's right to a deed to said premises."

The tender of a deed was not necessary. All that was necessary was an offer by complainants to make the deed and deposit it provided defendant would deposit the payments and perform his contract, and they made this offer. By the provisions of the contract in escrow, complainants were not obliged to deliver any deed to defendant, but only to deposit it in escrow with the Chicago Title and Trust Company after defendant had deposited the purchase money as provided in the contract.

The law does not require a needless formality, and an actual tender is unnecessary where the seller is ready, able and willing to perform on his part, and a tender would be a mere useless form. If before or at the time of performance the purchaser has declared his intention not to perform, or refuses to do so, the seller need only prove that he was ready and willing to perform on his part. Osgood v. Skinner, 211 Ill. 229; Cohen v. Segal, 253 Ill. 34.

And if tender by the vendor would prove ineffectual, the law does not require a vain act, and such tender is unnecessary. Thus refusal of the purchaser to perform, or his notification of the vendor that he is unable to perform, relieves the vendor of the necessity of tendering a deed. 39 Cyc. 1377. To the same effect are: Mix v. Beach, 46 Ill. 311; Peck v. Bright & Co., 69 Ill. 200; Clark v. Weiss, 87 Ill. 438.

Defendant's objection to the decree on the ground that the notice given was not reasonable is not sustained by the evidence.

warranty deed, or in default the money in the bank if courts would make the deed, which he refused to do unless he was paid a larger sum. The Court said:

> "In view of the opinion that the deposit of the balance of said purchase price in said bank was a condition precedent to plaintiff's right to a deed to said premises."

The tender of a deed was not necessary. All that was necessary was that offer by conveyancing to make the deed and deposit it previous determined would convince the purchaser and vendors the contract, and they made this offer. In the provisions of the contract in issue, conveyances were not obliged to tender any deed to defendant, but only to deposit it in escrow with the Guaranty Title and Trust Company after defendant had deposited the purchase money as provided in the contract.

The law does not require a useless formality. Even on mutual tender is unnecessary where the seller is ready, able and willing to perform on his part, and a tender would be a mere useless form. If before or at the time of performance the purchaser has declared his intention not to perform, or refuses to do so, his action would only prove that he was ready and willing to perform on his part.

Dancer v. Skinner, 121 Ill. 244; Cohen v. Segal, 208 Ill. 04.

And if tender by the vendor would have inoperative-but, the law does not require a vain act, and such tender is unnecessary. Some refusal of the purchaser to perform, or his notification of the vendor that he is unwilling to perform, relieves the vendor of the necessity of tendering a deed. 26 Ency. 1077. To the same effect are: Kile v. Tenney, 18 Ill. 267; Kerr v. Kimball & ux., 20 Ill. 481; Ginger v. Owen, 27 Ill. 148.

Defendant's objection to the decree on the ground that the notice given was not reasonable is not sustained by the evidence.

Defendant's objection to the decree on the ground that a court of equity will not decree a forfeiture should be overruled. The decree does not declare or decree a forfeiture, but merely decrees that defendant has by his own acts prior to the filing of the bill rescinded the contract or caused a forfeiture, and that the title to the earnest money was in complainants at the time the bill was filed. Earnest money in the hands of a trustee belonging to the seller because of the default of the purchaser cannot be returned to the purchaser, but may be decreed to be paid by the trustee to the seller.

In Bucklen v. Basterlik, 155 Ill. 423, it was urged that the Court was lending its aid to a forfeiture. The Court said:

"If the decree of the Circuit Court in its nature enforces a penalty, or forfeiture, it cannot be sustained. The contract between these parties recites that 'said purchase has paid $1,000 earnest money, to be applied on said purchase when consummated,' and should the vendor not comply with the terms in furnishing title, etc., 'the said earnest money shall be refunded.' By the terms of this contract the earnest money became the property of the appellee, of which he could be divested only in the event of his failure to perform his contract. The check was, at the time it was drawn, delivered to appellee, and while it is true it was afterward deposited, together with the contract, with the International Bank, the evident purpose thereof was to guarantee that Basterlik would, within the time prescribed, furnish evidence of a good title, in which event he would be entitled to the check or the money."

The Court cites the following passage from Fry on Specific Performance:

"Where the purchaser, after making the payment by way of deposit, unjustifiably repudiates the contract, or in any other way goes off through his default, the vendor is, in the absence of stipulation on the point, entitled to retain the money, treating it as having been paid to him as a guaranty for the purchaser's performance of the contract."

The Court also cites Depree v. Bedborough, 4 Giff., 479, where the Court said:

"Then how the person who is in default can,

Defendant's objection to this decree on the ground that a court of equity will not decree a forfeiture should be overruled. The decree does not declare or decree a forfeiture, but merely decrees that defendant has by his own default in the filing of the will breached the contract or caused a forfeiture, and that the title to the earnest money was in complainants at the time the bill was filed. Earnest money in the hands of a stakeholder belonging to the ballot because of the default of the purchaser cannot be returned to the purchaser, but may be decreed to be paid by the stakeholder to the seller.

In Keenan v. Lawrenzik, 168 Ill. 228, it was urged that the court was leaning too far to a forfeiture. The court said:

"If the decree of the circuit court in its discretion enforces a penalty, or forfeiture, it cannot be sustained. The contract between these parties recites that 'said purchaser has paid $1,000 earnest money, to be applied on said purchase when consummated,' and should the vendor not comply with the terms in furnishing title, etc., 'the said earnest money shall be returned.' By the terms of this contract the earnest money became the property of the appellee, if which it could be diverted only in the event of his failure to perform his contract. The check was, as the fact is it was taken, delivered to appellee, and while it is true it was afterward negotiated, together with the contract, with the international bank, the evident purpose thereof was to procure that institution, within the time prescribed, further evidence of a good title, in which event it would be entitled to the check or the money."

The court gives the following passage from Fry on specific performance:

"Where the purchaser, after making the payment by way of deposit, wrongfully repudiates the contract, or in any other way puts off (through his default), the vendor in the exercise of adjudication on the point, entitled to retain the money, treating it as having been paid to him as a penalty for the purchaser's performance of the contract."

The still also cites Jones v. Barber, 4 Ill., 473, where the court said:

"Then has the person who is in default can

upon that default, and in consequence of that default, acquire any right to the money, which was parted with as a security that there should be no default, it is difficult to conceive."

After citing these cases, the opinion of the Court in the Masterlik case proceeds as follows:

"It is clear from the contract that the only contingency which contemplated the return of the money to Bucklen was a default on the part of Masterlik."

The Court decides that the objections to the title were not good, and, therefore, Bucklen had failed to perform his contract, and hence Masterlik (who had not defaulted) had a right to declare the contract forfeited, and the earnest money was turned over to him. The Court also held in this case that no tender of the deed was necessary because it was evident under the facts in the case that the seller would have refused it.

Earnest money is a guarantee that the contract will be performed. If the sale goes on, it applies as part payment of the purchase money, but if there is a default on the part of the purchaser, he has no right to recover the deposit, but it belongs to the seller.

Howe v. Smith, 27 L. R. A., N. S. 89;
Catton v. Bennett, 51 L. T. (Ch. D.) 70;
Kelley v. Thompson, 101 Mass., 299;
Bucklen v. Masterlik, 155 Ill., 423;
Depree v. Medborough, 4 Giff., 479.

The conclusion reached by the learned Chancellor was right and proper and the decree appealed from is affirmed.

AFFIRMED.

upon that default, and in consequence of that default, acquire any right to the money, which was paid him as a security that there should be no default, it is difficult to conceive."

After citing these cases, the opinion of the court in the respondents case proceeds as follows:

"It is clear from the contract that the only contingency which constituted the return of the money to Hamilton was a default on the part of Waterbury."

The court decides that the objection to the title were not good, and, therefore, Hamilton had failed to perform his contract, and Hamilton (who had not defaulted) had a right to declare the contract forfeited, and the earnest money was tendered over to him. The court also said in this case that on trader of the bond was necessary because it was evident under the facts in the case that the seller would have refused it.

Earnest money is a guarantee that the contract will be performed. If the sale goes on, it applies as part payment of the purchase money, but if there is a default on the part of the purchaser, he has no right to recover the deposit, but it belongs to the seller.

Lore v. Smith, 27 L. R. A., N. S. 89;

Fulton v. Hunsicker, 81 L. T. (Ch. D.) 747;

Bailey v. Ingoldsby, 1 L. Ch., 133;

Hamilton v. Wentworth, 127 III., 452;

Jaques v. Lighthorne, 4 Giff., 474.

The conclusion reached by the learned Chancellor was right and proper and the decree appealed from is affirmed.

AFFIRMED.

2 - 20897

ALBERT W. RUDNICK, Administrator of the Estate of James F. Scannell, deceased, Defendant in Error, vs. CITY OF CHICAGO et al., Plaintiffs in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

198 I.A. 474

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The relator obtained from the Circuit Court a writ of mandamus reinstating him into the claimed office of "meter setter" in the Department of Public Works of the City of Chicago. From the judgment awarding that writ ~~respondents have~~ sued out a writ of error seeking a reversal. Since the writ was sued out respondents ~~have~~ suggested the death of relator and his administrator ~~has been~~ was substituted and duly summoned, and while his appearance had been entered he ~~has~~ failed to file briefs or argue the cause.

The cause was tried before the court upon the petition as twice amended, the answer of respondents and a stipulation of fact. The relator had before the filing of the petition been dismissed upon a trial before the Civil Service Commission, in conformity with the requirements of the Civil Service law.

We do not deem it necessary to our decision to notice any questions presented regarding the irregularity or the propriety of relator's discharge by the Civil Service Commission, but will decide only the first assignment of error, which is, "The petition as amended did not set forth facts which show the legal existence of the office or position of 'meter setter' nor the legal right of the petitioner to hold it."

We have concluded that by no averment of fact in the petition as amended is it made to appear that any such office as "meter setter" exists in the Department of Public Works of the City of Chicago. The relator avers that the Department of Public Works was created by ordinance passed April 18, 1881; that thereafter, by the revised code of the City of Chicago, 1897, the said department was established as an executive department of the municipal government of Chicago known as the Department of Public Works, embracing the Commissioner of Public Works and such other employees as the city council may by ordinance prescribe and establish.

By no averment of the petition as amended ~~is~~ was it made to appear that the city council by ordinance created the office of "meter setter," nor was any such ordinance alleged in such amended petition. The Civil Service Commission had no power to create the office. They could only classify the offices created by the ordinances of the city council. It is settled in this jurisdiction that in mandamus proceedings where the existence of an office is claimed, it must be made to appear by appropriate averments that the office was created in the manner prescribed in cases of this character by an ordinance of the city. Courts of general jurisdiction do not take judicial notice of municipal ordinances, but he who relies upon such an ordinance must allege and prove it as a matter of fact. People v. Busse, 248 Ill. 11; Stott v. City of Chicago, 205 ibid 281; Gersch v. City of Chicago, 250 ibid 551; Bullis v. City, 235 ibid 472.

The petition as amended does not cite any ordinance of the City of Chicago creating the office of "meter setter" and without the citation of such an ordinance in the petition of relator the court cannot determine that any such office exists. This principle of law is so uniformly well settled by so many decisions of our Supreme Court that

we do not deem it appropriate to further extend this opinion in demonstration of so clear a principle.

The judgment of the Circuit Court is reversed and, as the relator was not entitled to the writ of mandamus prayed and is now dead, the cause is not remanded.

REVERSED.

10 - 21527

SOL FINKEL, Defendant in error, vs. SAMUEL SCHINGER, Plaintiff in error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

193 I.A. 483

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

On a trial before the court without the intervention of a jury plaintiff had judgment for $150, and defendant brings the record to this court for our review and asks a reversal.

Plaintiff claimed to have loaned defendant $150 with which to pay money that defendant lost at gambling. Defendant invoked ~~section 134, chapter 38, R.S.~~ Rev. St., ch. 38, sec. 134, as a defense. It was not contended that the $150 loaned, or any part of it, was paid to plaintiff as money won by him from defendant at the gambling game of poker or any other gambling game of cards. It seems, however, that plaintiff and defendant and five other men were playing poker at plaintiff's house and that defendant lost $190, and having only $40 with him, at the conclusion of the game borrowed the $150 from plaintiff and paid it, together with the $40 he had with him, to the persons who had won various amounts of money from him.

The difficulty with plaintiff's contention is, that his own testimony lacks corroboration by any of the persons present during that evening who assumedly had knowledge of the transaction. None of these persons was called by defendant to testify in his behalf. On the other hand, two of the participants were called by and testified on behalf of plaintiff, and their testimony was corroborative of plain-

tiff's account of the transaction in every essential particular. Defendant's testimony was not supported by any other witness. In this condition of the proof the court could not find the issues otherwise than for the plaintiff.

At the time plaintiff loaned defendant the $150 in suit, the playing of the poker game was concluded and defendant borrowed the money from plaintiff with which to pay the persons who had won from him during the evening, plaintiff not being one of them. If plaintiff had received any part of the money loaned by him back again as money that he had won from defendant at the poker game, then the statute invoked would be a complete defense. It is the law, however, that a person who at the close of a gambling transaction loans money to pay a gambling debt may recover the money in an action at law, notwithstanding the lender may have knowledge of the purpose for which the money is borrowed and that it is to be disbursed in the payment of gambling debts.

We think plaintiff's claim comes within the ruling of Armstrong v. American Exchange National Bank, 133 U. S. 433, in which the court made the following observations: "An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case." Bank of Montreal v. Griffin, 154 Ill. App. 616, is to a like effect.

The judgment of the Municipal Court finding support in the evidence is affirmed.

AFFIRMED.

ILL's account of the transaction in every essential particular. Defendant's testimony was not contradicted by any other witness. In this condition of the proof the court could not find the issues otherwise than in the plaintiff.

At the close plaintiff issued defendant the judgment in suit, the payment of the money from which was considered and determined between the money from plaintiff with which to pay the persons who had won from him during the evening. plaintiff not being one of them. It plaintiff and receiving any part of the money issued by him such again as money that he had won from defendants at the card game, then the statute invoked would be a complete defense. It is the law, however, that a person who at the close of a gambling transaction loses money to pay a gambling debt but transfer the money in an action at law, notwithstanding the lender may have knowledge of the purpose for which the money is borrowed and that it is to be discovered in the payment of gambling debts.

To state plaintiff's claim clearly within the rules of Lyttleton v. Lawlessen (Ark.) 1 Pulleyn Ark. 130 S. W. 428, in which the court made the following observations: "An obligation will as enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff need not require the aid of the illegal transaction to make out his case." Duke of Brunswick v. Griffin, 184 Ill. App. 528, is to a like effect.

The judgment of the municipal court finding support in the evidence is affirmed.

AFFIRMED.

28 - 31632

AUGUST LEROY, Plaintiff in Error, vs. MINERVA V. SCOTT, Defendant in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

193 I.A. 491

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The writ of error in this case seeks to have reversed a judgment of nil capiat and for costs rendered in a trial before the court without a jury. Defendant in error has failed to appear.

The abstract of the record, the source of our search for errors, is as a whole meaningless. It is incoherent and in the fragmentary manner in which it is put together presents naught for judicial consideration or interpretation. Even the common law record is not abstracted and the bill of exceptions is simply referred to as such by name, but its contents are not even suggested. Were we to attempt from the abstract to determine the cause of action or the state of the pleadings our conclusions must be based solely on conjecture.

It is stated in the abstract that the declaration is in an "action of debt on a foreign judgment laying damages $79.50." It appears that a judgment by default was entered and then set aside; that pleas of nil debit (a bad plea in debt on a judgment) and of nul tiel record were subsequently filed; that a replication to the plea of nul tiel record, concluding with a verification, was filed, and that an ore tenus demurrer to the plea of nil debit was sustained. Then follows the judgment of nil capiat, which recites that

submission of the cause for trial by the court was pursuant to the stipulation of the parties. Subsequent to the entry of the judgment defendant filed, by leave of court, a plea of puis darrien continuance. No issue was joined on this plea. Plaintiff then moved to vacate the judgment and the motion being overruled on appeal was prayed and allowed.

While a full transcript of the record is before us, the abstract is but little more than an index to the record. The abstract is the pleading of the plaintiff in error and a court of review will not look beyond it and search through the record in an attempt to find reasons for reversal. The abstract fails to disclose anything which tends to impeach the judgment found in it. The Supreme Court, in Village of Des Plaines v. Winkleman, 270 Ill. 149, on a petition for a rehearing, pointing out material matter in the record not found in the abstract, made the following pertinent observations:

> "Our apprehension of the record is derived from the abstract prepared by the appellant and accepted as correct by the appellee. That abstract does not show the objection above quoted, and the appellee did not supply the omission, if it was an omission. Under such circumstances the court does not search the record to ascertain the issues, but acts entirely upon the abstract."

The abstract of the record failing to show any error of procedure or in the pleadings, the judgment of the Circuit Court is affirmed.

AFFIRMED.

29 - 21633

ROBERT H. HOLMES,
Plaintiff in Error,

vs.

MINERVA V. SCOTT,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

193 I.A. 493

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The record and abstract in this case are in all essential particulars the same as in the case of August Leroy v. defendant in error, General Number 21632, opinion in which is this day filed, and contain all the infirmities in that opinion pointed out. For the reasons appearing in the Leroy opinion supra, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Plaintiff in Error,

vs.

ON TO CIRCUIT COURT

OF COOK COUNTY.

Defendant in Error.

MR. JUSTICE MILLER DELIVERED THE OPINION OF THE COURT:

The record and abstract in this case are in all essential particulars the same as in the case of August Ikerey v. Defendant in error, decided October 21, 1892, opinion in which is this day filed, and contain all the infirmities in that opinion pointed out. For the reasons appearing in the Ikerey opinion supra, the judgment of the Circuit Court is affirmed.

AFFIRMED.

34 - 21676

ANTON J. CERMAK, for use of
HENRY STARK,
Defendant in Error,

vs.

F. A. STARCK PIANO CO., a corp.,
and UNITED STATES FIDELITY &
GUARANTY COMPANY,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

193 I.A. 494

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action upon a replevin bond plaintiff in a trial by the Court had judgment for $400 debt, the penalty of the bond, and $254 damages in the usual form, and defendant brings the record to this Court for review.

The replevin bond sued upon was given in a replevin suit, under which the defendant Piano Company took the piano of plaintiff. The replevin suit resulted in a judgment in favor of plaintiff and the award of a writ of retorno habendo for the piano. The piano was not returned and the measure of plaintiff's damages in a suit on the bond was its value together with his costs.

Defendants tendered in defense a writing claimed to be a contract between plaintiff and the Piano Company for the purchase of the piano in question on the so-called "instalment plan." It was claimed that under this contract plaintiff was behind in his payments at the time of the suing out of the replevin writ, and that thereby, under the contract, the piano was the property of the Piano Company and it had the right to reduce it to possession. Plaintiff denied that he signed the contract, but claimed that all he signed was a delivery ticket. Defendants' witness, Maury, while testifying that plaintiff signed the

It was action upon a replevin bond primarily in a trial by the court sans judgment for just cause, the penalty of the bond, and ignoring in its final form, and statement asking the record to this court for review.

The replevin bond sued upon was given in a replevin suit, under which the defendant piano company took the place of plaintiff. The replevin suit resulted in a judgment in favor of plaintiff and the award of a writ of retorno habendo for the piano. The piano was not returned and the remedy of plaintiff's remedies in a suit on the bond was its value together with its costs.

Defendants tendered in defense a writing claimed to be a contract between plaintiff and the piano company for the purchase of the piano in question on the so-called "installment plan." It was claimed that under this contract plaintiff was behind in his payments at the time of the suing out of the replevin writ, and that thereby, under the contract, the piano was the property of the piano company and it had the right to repossess it.

Plaintiff denied that he signed the contract, but claimed that all he signed was a delivery ticket. Defendants' witness, Lacy, while testifying that plaintiff signed the

proffered contract, admitted that it had been changed in several material particulars and that a large part of its terms had been added since plaintiff signed it. There was no proof that plaintiff assented to any of the changes made in the alleged contract. The Court excluded the writing because such material changes and alterations had been made without the assent of plaintiff. This ruling of the court left defendants without any defense, and our conclusion as to the correctness of such ruling must be the determining factor in our decision.

This ruling was without error, for, as said in Gardiner v. Harback, 21 Ill. 126, "The law will not tolerate such changes in the evidence the parties have provided of the terms of their contract, and if so made annexes as a penalty the release of the other party from all obligation under the contract."

The alterations in the contract were material and were made without the authority of the plaintiff. There was no subsequent ratification by plaintiff of such unauthorized changes, either express or by implication, flowing from any act of plaintiff subsequent to the making of such alterations. Under the proofs found in the record the legal title to the piano was in plaintiff. The finding and judgment of the Municipal Court are right and its judgment is affirmed.

AFFIRMED.

protected contract, admitted that it had been engaged in several material particulars and that a large part of its terms had been added since plaintiff signed it. There was no proof that plaintiff assented to any of the changes made in the original contract. The court evaluates the arising because such material changes are interwoven and have made without the assent of plaintiff. This ruling of the court left defendants without any defense, and our consideration as to the correctness of such ruling must be the determining factor in our decision.

This ruling was without error, for, as said in Hamilton v. Kerbaugh, 61 Ill. 196, "the law will not tolerate such changes in the evidence for parties have provided of the terms of their contract, and if it does sanction as a penalty the failure of the other party from all obligation under the contract."

The alterations in the original contract material and were made without the authority of the plaintiff. There was no subsequent ratification by plaintiff of such unauthorized changes, either express or by implication, flowing from any act of plaintiff subsequent to the making of such alterations. Under the proofs taken in the record the legal title to the piano was in plaintiff. The finding and judgment of the municipal court are right and the judgment is affirmed.

AFFIRMED.

391 - 21789

CHARLES F. HOFF,
Appellee,

vs.

L. GOULD & COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

193 I.A. 499

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $2916 against defendant on a trial before the Court, without a jury, and defendant appeals.

The defendant, L. Gould & Co., are wholesale dealers in wooden and willow ware and house furnishing goods in Chicago, and until July 6, 1909, owned and operated horses and wagons, etc., and used the same in the hauling of their goods. On that day defendant discontinued doing its own teaming and sold all of its horses, wagons, harness and other teaming equipment to the plaintiff. On the same day the parties entered into a contract which provided inter alia that plaintiff should do all defendant's teaming work for a period of five years; that it should for that purpose furnish defendant six double and two single teams with wagons, drivers and other necessary adjuncts, for which plaintiff was to receive from defendant as compensation $1,000 on the first day of each month, during the life of the contract. There was also provision made for the supplying of additional teams as the exigencies of defendant's business might require. Among the material conditions of the contract plaintiff agreed that during the term of the contract he would keep the wagons well painted, have defendant's name painted on them, and keep all the wagons, horses, harness, etc., in as good order and condition as the same were in when possession thereof was surrendered to plaintiff, and generally to carry

[illegible] v. Ariff.
Appellant;

and

1. Ziyad & Others,
Respondents.

[illegible] from Judicial Court
of Ceylon.

1971A. 199

Sir, Lord Diplock delivered the judgment of the Board.

Plaintiff instituted a judgment for paddy against defendants on a trial before the Judge, without a jury, and defendants appeals.

The defendant, 1. Ziyad & Co., who carried on dealers in wooden and allied ware and trades in building goods in Colombo, and until July 6, 1967, owned and managed horses and carts, the, but that was in the dealing of their goods. He that day defendant discontinued doing its own transport and sold all of its horses, carts, harness and other transport equipment to the plaintiff. In the same day the parties entered into a contract which provided inter alia that plaintiff should do all defendant's transport work for a period of five years; that it should for that purpose furnish defendant six carts and the stipulated tackle, harness, drivers and other necessary adjuncts, for which plaintiff was to receive from defendant as compensation Rs. 1,[illegible] on the first day of each month, during the life of the contract. There was also provision made for the supplying of additional carts as the exigencies of defendant's business might require.

Among the material conditions of the contract plaintiff agreed that during the term of the contract he would keep the carts well painted, have defendant's name painted on them, and keep all the carts, horses, harness, etc., in good repair and condition as the same were in when possession thereof was surrendered to plaintiff, and generally be carry

on and conduct the teaming business incident to the business of defendant in a manner "satisfactory" to defendant. On failure of plaintiff to comply with the foregoing conditions in a manner "satisfactory" to defendant, the defendant might, on giving thirty days written notice to plaintiff, declare the contract "forfeited and of no force or effect."

It is proven that plaintiff received the teaming outfit sold to him by defendant in first class condition, and under the teaming contract it was incumbent upon plaintiff to so maintain the teaming outfit at all times during his term of service thereunder. Plaintiff claims that he did so, but the overwhelming proof is that he did not. Plaintiff's idea of maintaining the wagons in good order and condition by keeping them "well painted" may be gathered from his testimony that he only painted the wagons once after he took them over under the bill of sale from defendant - a period of three years. The evidence demonstrates that plaintiff kept the horses in an ungroomed condition; that the harness was not clean; that the wagons were not "well painted" or kept clean, but were habitually dirty; that there were many holes in the wagon covers, causing rain to percolate through and damage goods being transported in such wagons; that, moreover, plaintiff's teamsters "loafed upon the job."

These conditions, when called to the attention of plaintiff were not denied but excused. Plaintiff in effect replied on one occasion that he could not afford to live up to his contract. Defendant being dissatisfied with conditions, availed of the right reserved by the contract to terminate it, and on February 15, 1913, gave plaintiff notice that the contract would be determined thirty days from that date. Since March 15, 1913, plaintiff has not done any teaming for defendant.

on and connect the landing mechanism incident to the release of defendant in a manner "satisfactory" to defendant. In failure of plaintiff to comply, the forfeiting conditions in a manner "satisfactory" to defendant, for reasons solely in plaintiff's hands unless notice to plaintiff, contains the contract "forfeited and to be null or void."

It is given that plaintiff received the towing outfit such is his by defendant in fixed other conditions, and under the foregoing contract it was discovered upon plaintiff in an machine the towing outfit at his place during the term of service instrument. Plaintiff argued that he did so, but the evidentiary proof is that he did not, plaintiff's claim of maintaining the engine - that [illegible] [illegible] keeping them "well painted" and be protected [illegible] and battery that he only polished the engine once after he took them over under the bill of sale from defendant - a period of three years. The evidence demonstrates that plaintiff took the batteries in an unplanned condition; that the batteries was not given; that the engine was not "well painted" by any claim, but were indisputably dirty; that there were many holes in the engine cylinder, causing them to deteriorate quickly, and damage among being transferred in some engines; that, moreover, plaintiff's statement "ruined the job."

These conditions, then either in the situation of plaintiff were not caused but occurred. Plaintiff in effect replied on one occasion that he really had after a time as his contract. Defendant being dissatisfied with conditions, months of the first received or the contract to [illegible] same is, and on February 13, 1919, here plaintiff makes that the earnest would be determined fifty days from last date, since June 19, 1918, plaintiff has not done any towing for defendant.

This suit was brought upon the assumption that defendant wrongfully terminated plaintiff's contract and to recover damages resulting to him from such alleged wrongful act. That plaintiff neglected to perform the contract in the respects complained about, is sustained by the evidence in the record. It is, moreover, evident that plaintiff did not perform his contract in a manner "satisfactory" to defendant. While defendant could not arbitrarily terminate the contract because of dissatisfaction, we think the "rule of reason" is the "canon of construction" to be invoked and applied to the condition which the record here discloses.

As said in Gibb v. Irving Park District, No. 21585, not yet reported, "where a contract provides that services to be performed must be satisfactory to the employer, such clause means that the services should be such that as a reasonable person the employer ought to be satisfied therewith. Kneier v. Clifford, 163 Ill. 544."

We think that as a reasonable person defendant was justified in concluding that plaintiff did not in material and essential particulars carry out the contract in accord with its conditions and that such conduct of plaintiff was not "satisfactory" within the meaning of the contract, and that defendant was consequently warranted in terminating the contract in the manner designated therein. Where, as in the case at bar, a contract is required to be performed to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man. The plain construction of the contract in the record in this regard is, that the teaming outfit was to be maintained and the teaming done in accordance with the contract in such manner that defendant, as a reasonable man, ought to be satisfied with it. Measured by these rules, de-

fendant had the legal right to terminate the contract in the way it did.

The judgment of the Municipal Court is wrong and is therefore reversed, with a finding of fact.

REVERSED WITH FINDING OF FACT.

(Over.)

391 - 21789 FINDING OF FACT.

The Court finds as a matter of fact that plaintiff did not perform his contract with defendant according to its terms or in a manner "satisfactory" to defendant, and that defendant had the right to terminate the contract, which it did by giving thirty days notice to the plaintiff of such termination.

88 - 21964

BRADFORD & COMPANY, Inc., Appellee, vs. UNITED STATES TENT AND AWNING COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 505

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this case the affidavit of meritorious defense was on motion of plaintiff stricken from the files, and a judgment, as in cases of default (the damages being assessed by a jury under the instructions of the trial judge) entered in favor of plaintiff for $3,508.03, and defendant appeals.

Assessment of damages by a jury is unnecessary unless requested. Mann v. Brown, 263 Ill. 394.

The sworn statement of the claim was sufficient from which to assess the damages. Weil v. Federal Life Insurance Co., 182 Ill. App. 322. The reading by defendant of its affidavit of defense to the jury while irregular was harmless error. When defendant's affidavit of defense was stricken the cause should have proceeded as in cases of default. Defendant in this situation was only entitled to cross examine plaintiff's witnesses in diminution of damages. As applied to the practice in the Municipal Court, the motion to strike the affidavit of defense is tantamount to a demurrer to defendant's pleading, which, being sustained, so far put defendant out of court that he could only cross examine witnesses for the purpose of minimizing damages. Binz v. Tyler, 79 Ill. 248.

The determination of this controversy rests in the construction of the contract between the parties. Plaintiff

[illegible] & DOLLAGY, Inc.,
Appellee,

vs.

[illegible] TRUST AND
[illegible] COMPANY, a corporation,
Appellant.

APPEAL FROM CHICAGO MUNICIPAL COURT
of CHICAGO.

[illegible]. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

In this case the affidavit of meritorious defense was on motion of plaintiff stricken from the files, and a judgment, as in cases of default (the damages being assessed by a jury under the instructions of the trial judge) entered in favor of plaintiff for $3,000.00, and defendant appeals.

Assessment of damages by a jury is unnecessary unless requested. Ebner v. Jones, 201 Ill. 344.

The sworn statement of the affidavit was sufficient from which to assess the damages. Hall v. Federal Life Insurance Co., 182 Ill. App. 322. The reading by defendant of its affidavit of defense to the jury while attempting was harmless error. When defendant's affidavit of defense was stricken the cause should have proceeded as in cases of default. Ebner in this situation was only entitled to cross examine plaintiff's witnesses in limitation of damages. As applied to the practice in the municipal court, the motion to strike the affidavit of defense is tantamount to a demurrer to defendant's pleading, which, being sustained, as far as statement out of court goes, he could only cross examine witnesses for the purpose of minimizing damages. Kinn v. Chicago, 77 Ill. 348.

The determination of this controversy turns in the contradiction of the testimony between the parties. Liability

contends that it is a contract of sale and defendant that it is a consignment contract. Or to put it another way, plaintiff insists that the goods sent defendant under the contract were sold to it, while defendant insists that the goods were sent to it for sale on assignment, and that under the contract it acted as plaintiff's factor and that the title to the goods remained in plaintiff.

The material parts of the contract are that defendant is to handle the entire line of pillow tops manufactured by plaintiff "on a consignment basis" subject to a five per cent return. Prices are stated which are to be paid by defendant to plaintiff as soon as money is received by defendant from purchasers; that "a full settlement is to be made November 1, 1914 for all stock on hand or in transit in excess of five per cent of the total shipments, said five per cent to be subject to *" (plaintiff's) "disposition and to be in first class merchantable condition as originally shipped." Defendant bound itself not to sell the goods for less than fifteen cents advance on the prices fixed. It is not in dispute that under this contract defendant received from plaintiff pillow tops to the value of $6,207.69 or that defendant is entitled to a credit of $2,689.66, which includes goods returned of the value of $324.50, which is slightly in excess of five per cent of the price of all the goods received by defendant. By this computation, if the contract is one of sale, there is due plaintiff the amount of the judgment. If it is not a contract of sale, but one of consignment for sale for account of plaintiff, then defendant may discharge its liability by returning to plaintiff its goods to the value, under the prices fixed by the contract, of the amount of the judgment.

In construing a contract, all of its parts must be considered. It is not what the parties may designate a contract

to be which will warrant the court in formulating a rule of construction in harmony with such designation, but from all the language used in the contract the court will ascertain the intention of the parties and by construction determine the measure and rights of the respective parties thereunder.

We cannot conclude, because there was used in the contract the term "on a consignment basis" that it is a "consignment contract" as distinguished from a "contract of sale" and thereby ignore its other material provisions, which clearly define the rights and obligations of the parties. The term on a "consignment basis" has relation to the time preceding the final date of settlement, November 1, 1914, when defendant expressly agrees to pay for all the goods theretofore received by it from plaintiff, reserving the right to return not more than five per cent of the total goods received.

We think that the reasoning of the court in Lonergan v. Stewart, 88 Ill. 44, is a rule of interpretation applicable to the instant case, where the court say:-

"When the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title to the property is not changed, but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return and the title to the property is changed - it is a sale."

Chickering v. Bastress, 130 ibid 206.

On November 1, 1914, if plaintiff had demanded a return of the goods theretofore received by defendant from it and than in the possession of defendant unsold, plaintiff would have been impotent to have enforced such demand under the contract in the record. Peoria Mfg. Co. v. Lyons, 152 ibid 427.

The contention of defendant in its affidavit of defense that the goods, the price of which was demanded by plaintiff in its statement of claim, were goods received on consignment in

virtue of the contract set forth in such statement, presented no defense, as we hold that the contract was one of sale.

The Municipal Court did not err in striking defendant's affidavit of defense and in entering the judgment appealed from, and the judgment is therefore affirmed.

AFFIRMED.

37 - 13494

ANTON PAPSZYCKI,

Defendant in error,

vs.

JOHN GURKA,

Plaintiff in error.

ERROR TO

SUPERIOR COURT

COOK COUNTY.

193 I.A. 507

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

By this writ of error defendant (plaintiff in error) seeks to have reversed a judgment entered against him in favor of plaintiff (defendant in error) for damages sustained as a result of having been bitten by a dog owned by the defendant.

Suit was brought June 2, 1911 and the declaration filed on the same day. The summons was served on defendant on June 3. On June 12 the appearance of defendant was entered by his attorney. No plea was filed. On July 14 default of the defendant was ordered taken on motion of the plaintiff and entered of record. On October 14, 1912 (15 months later) a jury heard evidence as to damages sustained by the plaintiff, and returned a verdict for $650.00 and costs, upon which judgment was entered by the court on October 19, 1912. Execution was issued on said judgment and demand made on November 11. On November 20 motion was made by counsel for the defendant to vacate said judgment and quash the writ of execution, which motion was denied on November 26.

Defendant, while setting forth many assignments of error, argues but two in his brief, viz.:

(1) That plaintiff did not, in his declaration, set out that he was in the exercise of due care for his own safety at the time he was bitten by the

dog; and

(2) Defendant's appearance having been entered, the court erred in assessing damages against defendant without notice to him.

With reference to the first contention, our Supreme court in C. & A. R. R. Co. v. Kuckhuck, 197 Ill. 304, held that in the case of domestic animals which are not naturally dangerous, the public are not bound to exercise care or caution unless they had ~~xxxxx~~ ~~xxxx~~notice of the vicious tendencies of the particular animal; and in arriving at that conclusion states, p. 310: "It is not necessary for a plaintiff to aver and prove the exercise of care and caution for his own protection, but it is matter of defense."

With reference to the second contention, the record shows that the default was taken on July 12, 1911. There is no claim that such default was improperly taken. The damages were not assessed until more than fourteen months thereafter. There is nothing in the record to indicate to this court that the assessment of damages did not occur when the case was reached for trial on the regular call calendar. Where nothing to the contrary appears in the record, it must be presumed that the case was tried upon the regular call of the calendar. Under such circumstances, the contention of the defendant that notice is necessary after default before the court can hold an inquest for assessing damages, is without force.

Finding no reversible error, the judgment is affirmed.

AFFIRMED.

12 - 20423

MARC SHERWOOD, Defendant in Error,	
vs.	ERROR TO CIRCUIT COURT, COOK COUNTY.
F. O. SMOLT, M. W. SHEAFE, ULRIC KING, AMERICAN-MEXICO MINING & DEVELOPING COMPANY, a corporation, G.V. PENNELL, J. E. MORRIS and FRED MATTERS, M. W. SHEAFE, Plaintiff in Error.	

198 I.A. 508

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Defendant in error (complainant below) filed a bill against plaintiff in error and others hereinabove mentioned, to declare and enforce an express trust imposed on certain personal property to secure the payment of a loan made to the American-Mexico Mining & Developing Company (hereinafter known as the company); which fund the bill alleged came into the hands of plaintiff in error and F. O. Smolt, two of the defendants below.

To this bill answers were filed by the company and plaintiff in error, to which answers replications were filed. A plea to the jurisdiction was interposed by Smolt, to which plea a replication was filed directly traversing the allegations therein set forth. A cross-bill was filed by the company against defendant in error, which was afterwards dismissed by stipulation.

Upon a hearing had on this bill the issues were found for the complainant and a money decree was entered against the company, Smolt and plaintiff in

error, for the sum of $7,725.00, which decree it is sought by this writ of error to reverse.

Although there are many errors assigned, plaintiff in error relies upon but two, viz.:

1. "The court erred in not setting aside the decree.

2. "The decree is not supported by the findings, and is erroneous."

We will take these up in their inverse order.

The record in this court (which was prepared by the plaintiff in error) contains no certificate of evidence. It must be presumed, therefore, that there was sufficient evidence ~~xxxxxxx~~ to sustain the finding of facts recited in the decree. The question is, therefore, whether or not there is a sufficient finding of facts to sustain the decree.

The bill of complaint alleged that the company was incorporated under the laws of South Dakota; that it was engaged in operating a mine and smelter at San Lorenzo, Durango, Mexico; that it was in great need for ready money for the purpose of smelting certain ores which had been mined and were ready for smelting; that F. C. Smolt was then superintendent and manager of said mine and smelter of the company; that Ulric King was cashier of the said company and was in charge of its financial matters; that the said Smolt and the said King (the latter also a defendant below) represented to complainant that the ore was of the value of upwards of $15,000.00; that if the company could obtain a loan of not to exceed $6,000.00 for the purpose of smelt-

error, for the sum of y^2, y^3, y^4, which equals 1 is
secured by this risk of error in inference.

Although there are many errors involved,
plausibly in error relies upon but two, viz.:

1. "The [illegible] error is not relating
[illegible] to [illegible].

2. "The [illegible] is not supported by
the figures, and it [illegible]."

We will take these up in their inverse order.

The record in this [illegible] (which are presented by
the plaintiff in error) contains no certificate of evidence
is must be presumed, therefore, that there was sufficient
evidence ~~[illegible]~~ to warrant the finding of the judgment
in the decree. The question is, therefore, whether or
not there is a sufficient finding of fact to justify the
[illegible].

The bill of complaint alleged that the company
was incorporated under the laws of [illegible]; that it
was engaged in erecting a [illegible] at San Lorenzo,
Durango, Mexico; that it had in [illegible] for [illegible] money
for the purpose of [illegible] [illegible] and [illegible].
[illegible] was [illegible] forwarding; that T. G. [illegible] was the
[illegible] and manager of said mine and president of the
company; that Chris King was [illegible] of the said company
and in charge of the financial matters; that [illegible] Smith
and [illegible] (the [illegible] [illegible]) [illegible]
[illegible] to complainant that [illegible] of the [illegible]
of upwards of $12,000.00; that if the company could obtain
a loan of not to exceed $[illegible] for the purpose of [illegible]

ing the said ore, it would result in great profit to the company; that complainant, together with plaintiff in error, G. V. Penwell, J. N. Morris and Fred Matters (also defendants below) advanced to the company the total sum of $6,000.00, in consideration of which the said company, by its aforesaid officers, Smolt and King, agreed to hold said ore, the product of the smelting thereof, and the proceeds to be derived therefrom, as a trust fund to secure the repayment to the defendant in error and his aforesaid associates, the sum advanced for said purposes. The bill also set forth the amounts advanced by the various persons who participated in the loan to the company. It further alleged that the company entered upon the smelting of said ore, using the advances made by complainant and his associates for said purposes, and realized therefrom a large amount of money, to-wit: upwards of $15,000.00 Mexico silver, equivalent to $7,500.00 in gold coin of the United States of America; that the company also sold outright upwards of 40 tons of said ore, valued at $4,000.00; that the company still had on hand 600 tons of said ore of lower grade, valued at upwards of $7,500.00. The bill further set forth that upon completion of the first smelting operation and the sale of the product, complainant applied to the company for an accounting of said proceeds and for payment to him and to his associates of the money due them; that a similar request was made upon the subsequent sale of the said 40 tons of ore; that these requests were made upon the said company and its officers, viz., the superintendent, and plaintiff in error, the president; that the company, by its said officers, Smolt and plaintiff in error, from time to time promised such accounting and payment of the moneys so due, but failed to keep these promises.

ing the said ore, it would result in great injury to the company; that Angelbert, Hughes and Hunnell in order, A. J. Howell, J. C. Martin and Fred Gardner (also defendants herein) entered in the company the total sum of $8,000.00, in consideration of which the said company, by its directors officers, Smith and Kimm, agreed to pay said ore, the product of the building thereof, and the proceeds to be derived therefrom, as a trust fund to secure the repayment to the defendant in error who his advances according, but was advanced for said purposes. The bill also set forth the amounts advanced by the various persons who participated in the loan to the company. It further alleged that the company entered upon the building of said ore, using the advances made by defendants and his associates for said purposes, and yielded the plaintiff a large amount of money, namely, upwards of $13,000.00 in cash, in lieu of the said ore; contrary to $7,000.00 in said ore of the fair market value of twenty; the company also entered upon and at the time of said ore, valued at $4,000.00; that the company still had on hand the total of said ore of first grade, valued at the sum of $7,000.00. The bill further set forth that upon completion of the first smelting operation and the sale of the product, sufficient profit to the company for the repayment of said advances and the payment to him and to his associates of the money due them; that a similar transaction was made upon the subsequent sale of the said 40 tons of ore; that these requests were made upon the said defendant and its officers, viz., the President-Smith, and Secretary in error, the principal; that the company, by its said officers, Smith and Kimm, in error, treated to have persuaded such assumption and payment of the money as due, but failed to keep their promises.

The bill of complaint further alleged that one payment of said smelting operations was collected by the said Smolt and deposited with the American Smelting & Refining Company in his own name; that thereafter the said Smolt remitted a portion of said fund to plaintiff in error, who was at that time president of the company; that the said Smolt and plaintiff in error converted and dissipated the said funds, or the greater part thereof, and failed to account to complainant therefor. The bill of complaint also contained certain interrogatories to be answered by said Smolt, plaintiff in error and the company; and concluded with a prayer for an accounting from all of the defendants, and that they be compelled to pay over to the complainant and his associates the amount equitably found due them.

To this bill answers were filed by the company and plaintiff in error. For the purpose of this case, it may be said that their answers controverted all the material allegations contained in the bill of complaint. Smolt did not answer, but rested upon his plea to the jurisdiction.

The decree set forth that the cause came on to be heard upon the original bill of complaint, the answer thereto of plaintiff in error and the company, the replications to said answers, and the plea of Smolt and replication thereto, ans also upon the evidence heard in open court and documents adduced in support of the issues by the various parties, and upon arguments of counsel. Then followed the finding of facts upon which the decree was based. The question arises, whether or not the finding of facts sustains the money decree.

The bill of exchange raises slightly less the presence of this condition precedent was emphasized by the bank which had contracted with the Barrister. Implying a Retaining Company in the two banks; that therefore the said Bank holding a policy of bank fund is relatively in every way the main, but the president of the company; that the bank bank funds and jurisdiction in order conferred and discussed the said funds, or the greater part thereof, amounted to amounts in consideration therefor. The bill of exchange also criminal-in-fact institutions is in accepted by said bank, jointly or every one for account; and therefore dealt with a payee for a consulting fee all at the references, and that they be compelled to pay fees to the Barristers and his associates for counsel equitably from the fund.

In this bill answers are filed by the company and jointly in error. For the purpose of this answer it is to be said that their answers contravened all the material allegations contained in the bill of complaint. Which did not answer, but rested upon the plea to the jurisdiction.

The Court was right that the proceeds in the hands of the original bill of complaint, the company, the company of jointly in every and the company, the principal on the real question, the plea of bank and relationship for the one side upon the evidence found in such court and documents assumed in support of the issues by the various parties, on upon agreements of counsel. Then followed the finding of the upon which the Decree was based. The quantity dispute, which is not the finding of funds remaining the money fund.

While plaintiff in error asserts that the finding of facts generally is not sufficient, his argument is based mainly upon the contention that there is nowhere any finding in said decree, that Smolt and King were authorized by the company to enter into this trust agreement. As we read the decree, while there is no express finding to that effect, yet it contains a sufficient finding of facts from which it may be reasonably inferred that the court did find as a fact that Smolt and King had authority to enter into the trust agreement. The decree finds that these men were in direct control of the company's affairs at San Lorenzo; that they had charge of the output of the mine and of the reduction of the ore; that these men had represented that it would be to the company's interest to smelt the ore already mined and therefore requested defendant in error to advance $6,000.00. The decree further found that complainant and certain associates, among whom was plaintiff in error, did actually advance $6,000.00 to the company; that the company used this money for the purposes for which it was advanced, in consideration of which it was agreed that the product of the smelting and the cash proceeds thereof would be held as a trust fund to secure the payment of moneys so advanced. The decree further found that upon the completion of the first smelting operation and the sale of the product thereof, the complainant applied to the company for an accounting of the proceeds of said sale and for the payment to him and his associates of the moneys due them; that similar demands were made upon the subsequent sale of the 40 tons of ore, for which the company received its payment in cash; that the demands for an accounting and for payment were made upon officers of the company by complainant. There was a further finding that the company, Smolt and plaintiff

Bible Industry is error manifestation that the finding of their economically is not initiative. His engineering is based mainly upon the information that there is nonsense any finding in main -- very, that Daily and ling very authorized by the company to enter into this trust agreement. As we read the decree, while there be no engineer finding to such effect, it contains a sufficient finding of fraud from which it may reasonably inferred that the main air flow as a 1.4 that small and ling had authority to enter into the trust agreement. The Court finds that there was a direct benefit to the company's affairs at the between; that the company's interest in main 90,000 and interest expense in error is approx 90,000. The Court further finds that engineering and certain minor also, among other and Daily in error, did actually advance $6,000.00 to the company; that the company made this money for the purpose for which it was advanced, in contemplation of which it was agreed that the product of the existing and such prepaid thereof would be held as a trust fund to account the payment of money so advanced. The Court further found that upon the completion of the first building operation and the rule of the product thereof, the engineering applied to company for an accounting of the proceeds of such main and the payment to Mia and the associates of the money so advanced that similar demands were made upon the engineering and of the 42 loan of ore, for which the company received the payment in cash; that the demands for an accounting and for payment were made upon officers of the company by complainant. The

in error, had from time to time promised an accounting to the complainant, and the payment of moneys due him, and that they put him off with such promises and representations, up to and including the time of the entry of the decree herein. From these findings the reasonable inference arises, that the court also found as a fact that the act of said Smolt and King in agreeing to establish the trust fund to secure the payment of moneys advanced by the complainant, was either authorized or ratified by the company.

The court further found that a sum of $6,000.00, realized from the sale of some of the products of said smelting operations, was collected by Smolt and by him deposited in his own name; that subsequently the said Smolt remitted this fund to plaintiff in error, who at that time was president of the company; that these two men (Smolt and plaintiff in error) had dissipated said fund or a large portion thereof, and had wholly neglected and refused to account for the same or any portion thereof. The decree further found that said $6,000.00 came into the hands of Smolt and plaintiff in error as a trust fund for the complainant, who was entitled to same with interest thereon at the rate of five per cent. (5%) from May 31, 1907. Clearly, therefore, the court was, in our opinion, fully warranted in entering the money decree against the defendants, one of whom was the plaintiff in error.

The other point raised by plaintiff in error is the refusal of the chancellor to set aside the decree. In opening his argument for reversal on this point, counsel says: "The merits of the case lie in the affidavits presented on the motion to vacate the decree." As far as this record shows, neither the verified petition to set aside the

in error, but from time to time provided an exception to the complainant, and the payment of money was made, and that is just like all said much premature and irregularities, or to and including the time of the entry of the decree below. From these findings the respondent Defendant claims, that the court also found as a fact that the act of said Plaintiff and they in expending in excess the sums from to time to the payment of moneys advanced by the respondent, was either authorized or ratified by the Company.

The court further found that a sum of $[illegible], realized from the sale of some of the property of said Plaintiff, was retained by them by the respondent in his own name; that subsequently the said Plaintiff sued this Plaintiff in error, and it had been proved of the judgment; that there was (Sheriff and Plaintiff in error) had distributed such fund or a large portion thereof, and had wrongly neglected and refused to account for the same or any portion thereof. The decree further found that $[illegible] made into the hands of Plaintiff in error as a trust fund for the complainant, who was entitled to have with interest thereon at the rate of five per cent. (5%) from May 24, 1877. Clearly, otherwise, the court was, in our opinion, fully warranted in granting the money decree against the defendants, the of whom was the Plaintiff in error.

The other point raised by Plaintiff in error is the refusal of the Respondent to set aside the decree. In opening his argument I'r Inverness on 1st. point, counsel says: "The merits of the case lie in the difficulties presented on the motion to vacate the decree." As far as this

decree nor the affidavits attached thereto, nor the affidavits prepared after the filing of the petition, appear in the certificate of evidence; before this court can consider such affidavits, it must appear that the affidavits were considered by the court below in passing upon the motion to vacate the decree. This fact could only be made to appear by making the affidavit a part of the record certified by the judge who heard the cause. The record in this case is merely the common-law record. There is no certificate of any kind attached to show that any affidavits were considered by the court, and in the absence thereof, it must be presumed that the action of the court in overruling the motion to set aside and vacate the said decree was correct, nothing appearing to the contrary in the record. This rule of law was clearly set forth in Lamut v. Meyer, 165 Ill. 420, wherein the court said, p. 422:

> "The affidavits copied into this record by the clerk, and which, it is claimed, were read on the motion to set aside and vacate thedecree, are not made a part of the record by a certificate of evidence, and are therefore not before us for our consideration. In Van Pelt v. Dunford, 58 Ill. 146, it is said, p. 146: 'The appellant seeks a reversal of the decree in this cause on two grounds: First, that the court ought to have awarded a new hearing on the affidavits filed in aid of a motion for that purpose. The affidavits to which reference is made form no part of the record and cannot be considered by the court. The appellant, to obtain the benefit of the affidavits in this court, should have had the same made a part of the record by the certificate of the judge who heard the cause in the circuit court.' The certificate of the judge attached to this record, that 'it contains all of the record necessary to a full and fair presentation of the errors complained of,' is not a certificate that the affidavits were read as evidence on the motion to set aside and vacate said decree, and is wholly insufficient to make said affidavits a part of the record."

To the same effect are: Du Quoin Water Works Co., v. Forks, 207 Ill. 46; also Bellinger v. Barnes, 223 Ill. 121, where-

Before our big affiliation network circuits, our film affiliates had practically alone the filling of our positions, except in the metropolis of Hollywood; before this point they contained most affiliates, it was quite clear that the affiliates were conditioned by the mere fact in running upon the notion to remain but passive. This fact could only be right to upset by making the affiliate a part of the network morphologically the image was about the same. The result in this case is merely the common-law result. There is no affiliate of the same standpoint to show that any affiliate will acquiesce by the mere, and in the absence thereof, it must be proven that the matter of the work in overriding the station is not made out through the station's overtures, making approaching on the station's part. This rule of law was already set forth in Lance v. Dunne. The 7th, 1937, Charles the court said, p. 4521:

> "The affiliate cannot make this result by the mere, and which, it is claimed, mere reason on the station to not take on radio broadcasts, are not made a part of the network by a contract of affiliation, and are contrary to the terms of the our connection. In Ben Hur v. Dunlap, 3d 111, 1d 4, p. 124: 'The contract shows a contract of the defendant in this action on the ground: first the action rights to have announced a new meaning on the affiliate film in all of a motion for that purpose. The affiliate is which determines is made free on part of the record and should be considered by the court. The affiliate, is which the benefit of the affiliate in this court, which have had its made a part of the record by the affiliate of the terms in the contract.' The affiliate of the court is the contract in this record, which the contract, that 'it contains all of the terms. Necessary in a full and fair presentation of the grounds upon which the affiliate will rest as a contract that the affiliate will rest as stations on the station is not valid and viable such issues, and in this instrument is the sole affiliate part of the record."

To the same effect, see: The Ozark Radio Corp. v. Grove

[illegible]

in the court, in passing upon this point, said, p. 124:

> "In our opinion neither of the affidavits is a part of the record proper, and the affidavits are therefore not before us for consideration. They are not preserved by a certificate of evidence, and it does not appear from any order or decree entered in the cause that they were either read or considered by the court in passing upon the respective motions to dismiss. Under such circumstances affidavits do not become part of the record." (citing Lange v. Meyer, supra.)

Plaintiff in error urges, however, that inasmuch as the petition was sworn to, it stands in a different category than affidavits. However, the verified petition and affidavits attached thereto become no more a part of the record in a proceeding of this kind than an ordinary affidavit. This precise point was passed upon by this court in Ford v. Ford, General No. 19899, wherein it was held that a verified petition for a change of venue was in the nature of an affidavit and under the rule announced in Lange v. Meyer, supra, could not be considered by this court unless incorporated in the certificate of evidence signed by the trial court.

While plaintiff in error also alleges that the decree is erroneous for certain other reasons, viz., that the plea of Smolt was not disposed of, and that King, although a party defendant, was not served, yet after careful consideration of the argument in support thereof, we are of the opinion that his contentions are without merit.

Finding no reversible error, the decree of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

69 - 21635

JAMES V. WALSH,
Defendant in Error,

vs.

NEW ENGLAND CASUALTY COMPANY,
a Corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 511

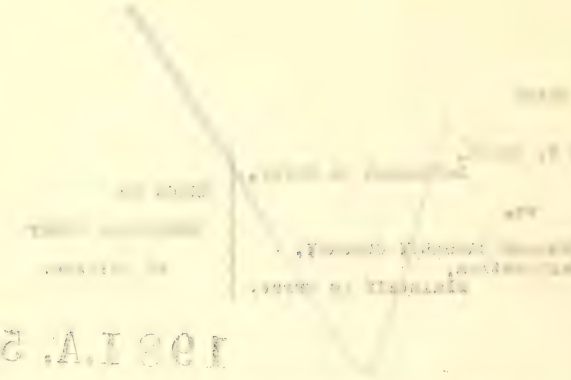
MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment for $84.00 and costs entered in the Municipal Court of Chicago in favor of defendant in error (plaintiff below), against the plaintiff in error (defendant below).

Plaintiff's statement of claim was for $80.00 due as wages for the month of August, 1914 which defendant refused to pay although often requested to do so by plaintiff. In the affidavitof merits it was denied by the defendant that there was any money due the plaintiff as no services had been rendered during that month and because plaintiff was discharged from the employ of the defendant for good cause during the month of July.

Plaintiff's claim was based upon the theory that because he was paid his salary on the 15th and 30th of each month, his employment was by the month; that he was not discharged until August 1st, hence defendant became liable for the whole month of August less such sums as plaintiff was able to earn elsewhere.

Plaintiff testified that he went to work for the defendant company about December, 1913 and continued in its



employ up to August 1, 1914; that he was paid twice per month (on the 15th and last days) at the rate of $45.00 for each one-half month; that on August 1st (Saturday) about 10:30 in the morning he received notice of his discharge, in a written communication addressed to him and signed by Thomas B. Ross; that he also, upon that day at one o'clock P.M. turned over papers still in his possession and belonging to the defendant, for which he received a receipt from the said Ross on behalf of the defendant company. Another witness on behalf of the plaintiff testified that he saw the plaintiff apparently at work in the office on the morning of August 1st.

On behalf of the defendant one George E. Jones testified that he was superintendent of the executive department of the defendant company and that he was the immediate superior of the plaintiff; that during the last week in July he called plaintiff's attention to the fact that he had not handed in his reports regularly; that plaintiff explained to him that he had been in court on other matters; that he (Jones) then made his report to Mr. Ross who had control of payroll auditors; that the letter from Mr. Ross discharging the plaintiff came into his hands on Friday morning, July 31st and was given to the plaintiff; that about 4:30 P.M. on that day, plaintiff talked with him as to the authority of Ross to discharge him; that he (Jones) told plaintiff he had no control over that question and advised him to take the matter up with Mr. Ross; that at nine o'clock the next morning plaintiff presented himself for work; that he also did so on the Monday morning following. Jones further testified that he paid plaintiff on July 31st and that the receipt was signed by plaintiff on that day.

Mr. Boss, also called on behalf of the defendant, testified that at 9:30 A.M. on July 31st he handed a letter to Jones, which letter informed plaintiff of his discharge; that plaintiff came to him on the next day (August first) a few minutes after nine o'clock, and asked him for work to do, and he told plaintiff he had no work for him but at that time plaintiff did turn over papers for which he (Boss) gave receipt to the plaintiff. He also testified that on July 29th he took up with plaintiff, in the presence of Jones, the fact that plaintiff had neglected his business and that he informed him he would have to communicate this fact to the president of the defendant company. Defendant endeavored to introduce a letter from the president, directed to Boss, ordering the discharge of the plaintiff; this, however, was not admitted in evidence.

Harry M. McConnell, another witness on behalf of the defendant, testified that he employed plaintiff without any definite agreement as to the time of employment; that the first employment was merely temporary, and that when that was completed, plaintiff asked him to arrange more work for him, and he informed plaintiff that there was nothing of a permanent character to offer, but that there were three or four audits that he might go out on, and that in that way he continued in the employ of the defendant company; that at first he was paid $15.00 per week and later on he received an advance of some $5 or $6 per week.

There was no denial by the plaintiff as to the circumstances under which he was employed, nor of the fact that fault had been found with him for his failure to attend to his business during the last week in July, nor any denial of the charge of negligence. On this state of the record the cour

entered judgment for $54 and costs in favor of the plaintiff, this being one month's salary less what plaintiff had earned in other employment during August.]

In view of the foregoing evidence, it must be considered that there was no hiring from month to month, and even had there been, that the plaintiff was discharged for good cause. Furthermore, the evidence shows that plaintiff was actually discharged on Friday, July 31st. Therefore, if he reported there August 1st and did work this was purely voluntary on his part. Under all these facts and circumstances, we are clearly of the opinion that the court erred in finding for the plaintiff and that judgment should have been for the defendant. The judgment will be reversed.

REVERSED.

Finding of facts: We find as a fact that there was no hiring by the defendant company from month to month; that plaintiff was discharged on July 31, 1914 for good cause; and that the defendant is not indebted to the plaintiff as set forth in the statement of claim.

tered judgment for $94 and costs in favor of the plaintiff, that being one month's salary less what plaintiff has earned in other employment during August.

In view of the foregoing evidence, it does be questionable that in the week during Tom worked in Seattle, and upon that date, that the plaintiff was discharged for good cause. Furthermore, the evidence also shows that plaintiff was actually discharged on Friday, July 31st. The review, if it involved above August 1st, the old work this was purely voluntary on his part. Under all those facts and circumstances, we are clearly of the opinion that the court erred in finding for the plaintiff and that judgment should have been for the defendant. The judgment will be reversed.

DISSENTING.

Finding of Fact: We find as a fact that Tom Jones was on duty by the defendant company from week to week; that plaintiff was discharged on July 31, 1914 for good cause; and that the defendant is not indebted to the plaintiff as set forth in the statement of claim.

21058

68 - 21058

BARTHOLOMAE & ROESING BREWING & MALTING CO., a Corporation,

Defendant in Error,

vs.

CHICAGO RAILWAYS COMPANY, a Corporation, and LANGSMAN TEAMING COMPANY, a Corporation,

LANGSMAN TEAMING COMPANY,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

198 I.A. 512

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

In an action brought by defendant in error against the Chicago Railways Company (hereinafter referred to as the railways company) and plaintiff in error, for damages sustained in a collision, the court sitting without a jury dismissed the suit as to the railways company but found the plaintiff in error guilty and assessed defendant in error's damages in the sum of $75.60, upon which finding the judgment was entered to reverse which this writ of error has been prosecuted.

The evidence introduced on behalf of ~~the defendant in error~~ plaintiff, showed that a beer wagon having on it a load of 20 barrels of beer, belonging to it was standing on the west side of Western avenue, facing south, about 30 feet south of a saloon with which ~~the defendant in error~~ plaintiff did business; that directly behind this wagon, and in front of said saloon, was a wagon belonging to ~~the plaintiff in error~~ defendant, also facing south. This wagon pulled out and proceeded in a southeasterly direction

in order to pass the wagon of ~~the defendant in error~~ plaintiff and after getting on to the car tracks of the railways company, was struck by a car owned by the railways company. The evidence showed that the wagon of ~~the defendant in error~~ plaintiff was struck at the rear wheel, and the force of the impact knocked off several barrels of beer, the contents of five of which leaked out. It further appeared from the evidence that the car struck the wagon of ~~plaintiff in error~~ defendant at about the front wheels, and that the car, just previously to hitting the wagon, was going rapidly; that at the time of the collision the horses attached to the wagon of ~~plaintiff in error~~ defendant were at the rear of ~~defendant in error's~~ plaintiff's wagon, which, during this entire time, was standing still. Evidence was also introduced as to the damage done to the wagon, to the barrels and as to the value of the beer that had leaked out of them. The evidence showed that the total amount of damages sustained was $78.60.

At the close of the defendant in error's case, both the railways company and the plaintiff in error moved the court to dismiss the cause. The court granted the motion as to the railways company but denied the motion of the plaintiff in error.

The testimony offered on behalf of ~~the plaintiff in error~~ defendant corroborated that offered on behalf of ~~the defendant in error~~ plaintiff with respect to the position of the wagons at the time the wagon of ~~the plaintiff in error~~ defendant pulled out to go south and pass the wagon of ~~the defendant in error~~ plaintiff. There was other testimony on behalf of ~~the plaintiff in error~~ defendant that the rear of its wagon was struck and not the front; also that when its wagon started to pull out, one witness stated that the car causing the accident was some 200 feet away, while another

witness stated it was 100 feet away; that it was coming fast; that it did not slacken its speed until it was within ten feet of the wagon of ~~the plaintiff in error~~ defendant.

On this state of the record, the court entered the judgment complained of. Plaintiff in error urges no grounds for reversal, the error of the court in failing to dismiss it at the close of defendant in error's case; and further, that the evidence showed that the accident was not due to any negligence on its part but was due to the negligence of the railways company; and urges further, that even if it had been guilty of negligence in having its wagon on the car track, yet this did not relieve the railways company of liability, since the railways company had the "last clear chance to avoid it."

As far as this verdict is concerned, all that the defendant in error was required to show was that some act of negligence of the plaintiff in error contributed to the collision whereby the damages in question were sustained. There is evidence in the record from which the court was warranted in concluding that the plaintiff in error was guilty of negligence which contributed to the accident in question. While plaintiff in error introduced evidence in the case, it was of a character rather to show that the negligence on the part of the railways company contributed to the accident. Such evidence, however, would not absolve it of responsibility for its own act of negligence. Being itself guilty of negligence, plaintiff in error is in no position to complain that the railways company should also have been held liable. The rule of law is that a person may recover against one or all joint tort feasors in an action of this kind. The defendant in error should not be called upon to suffer a reversal in this case merely because in the opinion of the plaintiff in error the court should have found the

railways company also liable. For the foregoing reasons, the judgment will be affirmed.

AFFIRMED.

143 - 21114

BENTON WANDER,

Defendant in Error,

vs.

W. J. LAKE,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

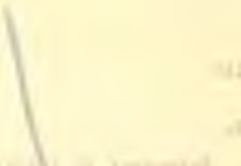
198 I.A. 514

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment for $71.63 in favor of defendant in error (plaintiff below) against plaintiff in error (defendant below), for money alleged to be due for groceries and meats sold and delivered by plaintiff to the defendant, during June, 1906, after deducting a payment of $5.00 made by defendant to plaintiff on August 22, 1909. The affidavit of merits alleged by way of defense, that the account in question had been wiped out by defendant's discharge in bankruptcy granted on the seventh day of October, 1907, plaintiff's claim having been scheduled among defendant's debts in that proceeding.

The only question in the case was, whether at the time of the $5.00 payment (August 22, 1909) there was an unconditional promise by the defendant to pay plaintiff the indebtedness due him prior to the discharge in bankruptcy. There were but two witnesses in the case - the plaintiff and the defendant.

The testimony of the plaintiff fairly tended to show that the $5.00 payment was made on account of the old indebtedness and that defendant had, at the same time, made an unconditional promise to pay the remainder of the indebtedness due prior to his discharge in bankruptcy. Defendant tes-



tified that the $5.00 was not a payment on said account but to invoke the good will of plaintiff to assist him in soliciting life insurance from his (plaintiff's) brother, and that he did not enter into any promise or agreement to pay the indebtedness that had already been discharged.]

The finding of the court for the plaintiff and the rendition of judgment thereon must be taken by us as a finding that an unconditional promise was made by the defendant at the time in question. Marshall v. Tracy, 74 Ill. 372. We cannot say that such finding is clearly and manifestly against the weight of the evidence, hence the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

512 - 21910

PEOPLE OF THE STATE OF ILLINOIS ex rel. Mattie Zimmerman,

Appellee,

vs.

ARTHUR RHOEDE,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

198 I.A. 537

MR. PRESIDING JUSTICE FAM delivered the opinion of the court.

This is a prosecution for bastardy on complaint of Mattie Zimmerman, the relatrix herein. This case was tried twice, - first by the court and jury, and the second time before the court alone. Both terminated in a finding of guilty, and judgment having been entered on the second finding, the defendant has prosecuted this appeal. In urging a reversal, defendant contends that the judgment is clearly and manifestly against the weight of the evidence.

There are two questions in the case, viz.; (1) The date of the first act of sexual intercourse between the parties; and (2) Was the child prematurely born?

Relatrix testified that on a Saturday night, some time during the month of October, 1914, she and one Elizabeth Kaiser attended a dance held at a place known as the Lincoln Turner Hall, in the City of Chicago, where they met defendant and one Buehlke; that some time later the four, i. e. the relatrix, Miss Kaiser, the defendant and Buehlke, went directly

from there to the home of Miss Kaiser, where they remained for some time, during which period she (the relatrix) and defendant had sexual intercourse, as a result of which she conceived; that thereafter the defendant became a frequent visitor to her home, and that illicit relations continued intermittently until a short time before the child was born (June 27, 1915). She further testified that after her first intercourse with defendant, her period of menstruation ceased until after the child was born, and that the child was a full term child.

Defendant testified that he met the relatrix for the first time on December 5, 1914 at a dance held under the auspices of the De Luxe Athletic and B[illegible] ~~of the De Luxe Athletic & Benevolent Association, at the Lincoln Turner Hall~~ at the Lincoln Turner Hall. His testimony on this point conflicted with that of the relatrix only as to the date on which they first met. It is important to fix the date of the first meeting between the relatrix and defendant, inasmuch as it is contended by the relatrix that it was at their first meeting that sexual intercourse took place.

The only testimony, other than that of the relatrix, offered on her behalf, was that of her mother, who testified that she saw defendant in her home during November, 1914 and that she saw him frequently in her home after that time. Corroborating the defendant as to the time of the first meeting, were four witnesses; Arthur Haas, Elizabeth Kaiser, Harry Muehlke, and George Throne.

Arthur Haas and George Throne both testified that they met the relatrix and defendant on December 5, 1914 at a dance held under the auspices of the De Lux Athletic & Benevolent Assn.,

at the Lincoln Turner Hall, and identified the dance program used on that occasion.

Elizabeth Kaiser testified that she met defendant at the Lincoln Turner Hall the first Saturday in December, 1914; that she and the relatrix had gone there together unaccompanied; that they were introduced by Harry Muehlke to the defendant, and that they danced with them; that the four, i.e. the relatrix, defendant, herself and Muehlke, left the dance hall at about 11:30 P.M. and rode on a street car to Belmont and Lincoln avenues, where the four stopped off for chop suey, after which they all went to her home, arriving there about one o'clock in the morning or thereabouts, where they spent considerable time in the front parlor, the two couples sitting on opposite sides, with the room in darkness. Miss Kaiser's testimony was corroborated by Harry Muehlke who also identified the program and admission ticket used at that dance.

The relatrix did not deny that she attended the dance given under the auspices of the De Luxe Club; in fact, her testimony is in full accord with that offered on behalf of the defendant except as to the date on which the meeting took place. The relatrix, moreover, insisted that the dance at which she met defendant was the only one she ever attended with him, and that it was on the same night that the first act of intercourse took place. We are satisfied, from all the testimony in the case, that the dance at which the relatrix met the defendant was the one held on December 5, 1914, and that the relatrix first met the defendant on December 5, 1914 and not during October of that year. It is fair to presume, in view of the facts and circumstances in evidence, that the court in finding defendant guilty, proceeded upon the theory that the first meeting was in December, but that the child was a seven months' child.

in the Lincoln Tavern hall, and identified the dance program used at that dance.

Although Rabin testified that she was unaccompanied at the Lincoln Tavern until the first Saturday in December, 1919; that she and the relatrix had gone there together unaccompanied; that they were introduced by Harry Mueller to the defendant, and that they danced with them; that the four, i.e. the relatrix, defendant, Mueller and Rabin, left the dance hall at about 11:30 P.M. and went to a street car at Halsted and Lincoln avenues, where the four stopped off for some eats, after which they all went to her home, arriving there about one o'clock in the morning or thereabouts, where they spent considerable time in the front parlor, the two couples sitting on opposite sides, with the room in darkness. This witness' testimony was corroborated by Harry Mueller who also identified the program and admission ticket used at that dance.

The relatrix did not deny that she attended the dance given under the auspices of the Welcome Club; in fact, her testimony is in full accord with that offered on behalf of the defendant except as to the date on which the meeting took place. The relatrix, however, testified that the dance at which she met defendant was the only one she ever attended with him, and that it was on the same night that the first act of intercourse took place. We are satisfied, from all the testimony in the case, that the dance at which the relatrix met the defendant was the one held on December 6, 1919, and that the relatrix first met the defendant on December 6, 1919 and not during January of that year. It is fair to presume, in view of the facts and circumstances in evidence, that the court in finding defendant guilty, proceeded upon the theory that the first

The question then arises whether, under the evidence in the case, the relatrix sustained the burden of proof on the question whether or not the child was a seven months' child. In determining that question, we must consider not only the expert testimony in the case but also many other facts and circumstances appearing in evidence on the trial below.

On the question whether or not this was a full term child, two physicians testified for the defendant and one (Dr. De Lee) was called by the court. On behalf of the defendant, Dr. Becker testified that he was in attendance at the time the relatrix was confined and that the child in question was well developed and possessed every appearance of a full term child, i.e. where the period of gestation covered nine months; and that it was in fact a full term child. Dr. Moje, who saw the child within a month after birth, also testified that it presented every appearance of a normal full term child, exceptionally well developed, and in fact was a full term child; both doctors setting forth the facts upon which they based their conclusions. Dr. De Lee, who was called by the court, stated that when he saw the child (which was about two months after its birth) he could not tell whether it was a full term or a seven months' child; that, however, a child born within seven months might have the normal development of a full term child. He, however, did state that that was unusual and the exception.

Defendant insists that not only does the expert testimony show that the child was not prematurely born, but that there are other facts and circumstances in evidence which show clearly, or at least make improbable the fact that this was a seven months' child; that on the contrary, the evidence clearly shows that the child was a full term child. In this contention we must concur.

It would serve no useful purpose for us to set out in detail here the facts in the record upon which we base our conclusion. The record shows that [The relatrix met other men with Miss Kaiser during the months of September, October and November, 1914, under the same circumstances, and repaired to the home of Miss Kaiser, occupying the same room in the same manner as she did with the defendant at the time she claimed the first act of intercourse took place. There ~~is~~ was also evidence in the record that she met other men during September, October and November at other places, who accompanied her to her home, under circumstances which indicate she was not particular as to the manner in which she met these men or the character of the men themselves.] We are satisfied, from an examination of the record in this case, that the finding of the court is clearly and manifestly against the weight of the evidence. In arriving at our conclusion, we are not unmindful of the fact that the court sitting as court and jury saw and heard the witnesses testify and was therefore in a more advantageous position to judge of their credibility and weigh their testimony. However, we are constrained to arrive at our conclusion by the testimony of the relatrix herself, who insisted that the child was a full term child and that it was conceived during October 1914, and that she never at any time notified defendant of her pregnant condition nor charged him with the paternity of the child until after its birth. Being satisfied that the finding of the court is clearly and manifestly against the weight of the evidence, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

547 - [illegible]

[illegible],

Defendant in error,

vs.

[illegible] and [illegible],

Plaintiffs in error.

[illegible]

[illegible]

[illegible]

198 I.A. 547

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal from a judgment against the plaintiffs in error, hereinafter referred to as the defendants, in favor of the defendant in error, hereinafter referred to as plaintiff, for $[illegible]. There was sufficient evidence to sustain the plaintiff's claim that she had left with the defendant Pauline Schurter the sum of $[illegible] on one occasion, and $[illegible] on a later occasion, that the money so deposited had been turned over to the defendant Louis Schurter and used for the joint benefit of both, and that only $4.00 of the amount so deposited had been returned. It was admitted that $[illegible] had been left by the plaintiff with the defendant Pauline Schurter some time in May, 1911, but it was denied that any portion of this came into the hands or under the control of the defendant Louis Schurter. In regard to the latter point, and in regard to the question of whether it was $[illegible] or $[illegible], the trial judge who heard the case without a jury, evidently resolved for the plaintiff. The plaintiff also testified that some time in September, 1908, a little less than five years before suit was started, she left $[illegible] with the defendant Pauline Schurter, and there is evidence that that sum came into the possession of Louis Schurter, and was used for the joint benefit of the defendants. The defendant Pauline Schurter's affidavit evasively admitted the loan of the $[illegible] in the month of September

1906, and said that if any money has been loaned her prior to August 1, 1907, it was outlawed by the statute of limitations. We think the evidence disclosed that the loan was advanced prior to August 1, 1907, and the question therefore arises as to when the statute of limitations began to run. The plaintiff was the mother of the defendant Pauline Schurder, who was the wife of the defendant Louis Schurder.

It clearly appears from the testimony of the plaintiff that she left the money with her daughter with the express understanding that defendants should use it for their own benefit, and that they were not to return it unless she needed it and asked them to do so. The loan left with the defendant Pauline Schurder in 1911 was left with a similar understanding. Apparently no demand was made for a return of the money until 1914, when plaintiff wrote defendants, making a formal and explicit demand for the return of the money. It is clearly the law of this State that where one deposits money with another with the understanding that the person receiving the same shall use it for his own benefit, and return it on demand, that there is no duty or obligation resting upon the person receiving the money to return it until a demand is made, and consequently the statute does not begin to run until the return of the money has been demanded. This has been decided by our Supreme Court in Gallagher v. Gallagher, 187 Ill. 386, in which the facts were, in all material respects, similar to those in the case at bar. In the case cited, one Gallagher deposited certain moneys with plaintiff to receive the which he gave a receipt in which he said, "the interest to be used by me until he or otherwise, to be

delivered to her whenever called for." Therefore, with the consent of Mrs. Wood, he sold the bonds and used the money. Twenty years afterwards, proceedings were had to recover the value of the bonds, and the statute of limitations was pleaded. The court said at page 182:

> "It was clearly, in this case, the agreement of the parties that no duty to return the money or the bonds should arise until an actual demand for the same should be made. Under the original contract no action could have been maintained by Mrs. Wood for these bonds without an actual demand; and the proofs tend to show, and we think do show, that the money for the bonds was not payable until actually demanded. The permission by Mrs. Wood to plaintiff in error to retain this money continued until the time of her death, and the lapse of time since her death had not been sufficient to bar the claim."

The court also said:

> "It may be that it was then her intention and expectation that the bonds never should be called for by her, but it is equally plain that she intended to retain her right to call for them if circumstances should make that course desirable to her."

We think it is equally clear in the case at bar that the plaintiff did not intend to make an absolute gift, but that there was no duty cast upon the defendants to return the money until she demanded it. As no demand was made until shortly before the suit was begun, the statute of limitations had not run. If there was sufficient evidence in the record to sustain the court's findings, the judgment must be affirmed.

AFFIRMED.

[illegible] - [illegible]

[illegible]

[illegible] Corporation, etc.,
defendant in error,

vs.

[illegible]
plaintiff in error.

198 I.A. 549

[illegible] delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as the defendant, sued out this writ of error to reverse a judgment recovered by the defendant in error, hereinafter referred to as plaintiff, for [illegible], for paints, oils, and varnishes. The cause was heard before the court without a jury.

The only conversation had with reference to the contract between defendant and anyone representing the plaintiff was over the telephone. One of plaintiff's witnesses testified to a conversation with defendant, in which defendant agreed that the goods in question, which were ordered by a painter, should be charged to him; he also testified that the painter had frequently bought paint of the plaintiff, and sometimes on credit. Defendant denies that such a conversation occurred, but said that at a later date he had a conversation with reference to the goods being left at his place. He testifies further that these goods were not used in any work of his, but in work done for the Intermodal Drawing Company, the lessee of the premises occupied by him, although the painter had done some work for him prior to that time.

It appears that the materials in question were left with the defendant April 29 and May 5, and that on June 1st defendant received a bill for them, but paid no attention to it; that it was the only statement he received; and that he was advised to pay no attention to it. [illegible]

was begun November 1[illegible] of the same year.

Counsel for defendant claim, in effect, that as there was one witness testifying upon one side, and another witness testifying directly to the contrary, there was no preponderance of the evidence. This might well be so if the question of the preponderance of the evidence depended solely upon the number of witnesses, but it has been repeatedly held that it does not. Moreover, while the fact that when a bill was sent defendant for the goods delivered it and used to describe his place of business, he did not repudiate any liability, might not in itself be sufficient to warrant the inference that he admitted responsibility for the bill, yet, that fact is a circumstance which the court had a right to take into consideration in determining the question of the preponderance of the evidence. As there was sufficient evidence to support the finding of the court, the judgment must be affirmed.

Affirmed.

198 I.A. 550

ORR - 21707.

[illegible],
Defendant in Error,

vs.

EVELYN MOSER,
Plaintiff in Error.

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE [illegible] delivered the opinion of the court.

The plaintiff in error, hereinafter referred to as defendant, prosecutes this writ of error to reverse a judgment against her, entered in the Municipal Court in favor of the defendant in error, hereinafter referred to as plaintiff, for architect's fees for services alleged to have been performed by the plaintiff at defendant's request. The defendant's husband, who, under section 5 of chapter 51 of the Illinois Revised Statutes, was a competent witness in this cause, was called as a witness in her behalf. Upon questions being put to the witness, the court sustained an objection. That occurred thereupon is recited in the record as follows:

"Mr. Moses: All right. We offer to prove by the witness - The Court: You won't offer to prove anything by the witness. Mr. Moses: - the substance of what has been testified. The Court: No, no. Mr. Moses: That the testimony mentioned in the proof - The Court: Wait a minute, don't start in on that at all, call your next witness. Mr. Moses: I have no other witness. Mr. Catlin: No evidence of agency on behalf of the husband, never made that proof. Mr. Moses: All I want to do is to save my record if your Honor please. Your Honor will at least give me the privilege of saving my record. The Court: No, I would not let you do it on this record. Mr. Moses: May I write it out at some other time, the offer to prove? The Court: You won't prove anything by

this witness at all. This is the husband of the defendant. Mr. Moses: That is your Honor's ruling; I submit that ruling is not correct and I want to make a record from - The Court: I will stand on the ruling. There won't be anything from this witness. You won't offer to prove anything. Mr. Moses: I only want to make an offer to preserve my record for the - The Court: Don't waste any time on it. Mr. Moses: - Appellate Court if your Honor please. The Court: All right. You have got another chance with the Appellate Court. Mr. Moses: I know, but for the purpose of saving the record in the Appellate Court - The Court: Have you anything further? Mr. Moses: I want to make an offer, that this witness will - The Court: The witness will not testify to anything. The witness is objected to and the objection is sustained, on the ground that the witness is the husband of the defendant. (Exception.) Mr. Moses: I understand. The Court: That is all there is to it. Mr. Moses: All I want to do is to save my record here by telling your Honor what the witness would testify to. The Court: I don't want to know what he will testify. Mr. Moses: So the Appellate Court, when it gets to the Appellate Court will know what I expected to prove by this witness. The Court: They will never know that way. (Exception.)"

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Counsel's contention that the defendant's offer was but to prove what the defendant herself had already testified to, is without merit. Defendant's counsel was entitled to have an opportunity to make his offer fully, and this was denied him. For this reason, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

[illegible]

IDA [illegible], a minor, by
[illegible], her next friend,
Appellee,

vs.

[illegible] COMPANY,
a Corporation,
Appellant.

APPEAL FROM

[illegible]

[illegible] COUNTY.

198 I.A. 551

MR. JUSTICE [illegible] delivered the opinion of the court.

This appeal was taken from a judgment against the appellant, hereinafter referred to as defendant, for $5,000 recovered by appellee, hereinafter referred to as plaintiff, for personal injuries alleged to have been caused by the negligence of the defendant. The declaration originally consisted of six counts, but prior to the trial, on motion of plaintiff's attorneys, it was amended by dismissing the 4th, 5th, and 6th. The first count alleged, in general terms, that the defendant carelessly and negligently drove its automobile truck, and in consequence the plaintiff was struck and run over; the second count charged that the defendant carelessly and negligently drove the truck at a high, dangerous and excessive rate of speed, to-wit, 40 miles an hour; while the third count charged that the defendant failed to ring the bell or sound the horn with which the truck was equipped, or otherwise to warn the plaintiff of the danger.

The evidence disclosed that a chauffeur and helper in the employ of the defendant were driving a truck weighing about 8,700 pounds, loaded with about five tons of coal, in a westerly direction along the north side of Hastings street. The chauffeur and helper were seated in the cab in several seat, which had celluloid curtains front and back, but open at the sides.

The back curtain had holes covered with celluloid about twelve inches square, but there was no testimony as to how the front curtain was constructed.

The truck entered Hastings street at Loomis street, in the vicinity of Laflin street; on the north side of Hastings street, a German band was playing, and there were children running about in the street. About seventy-five feet from Laflin street, the plaintiff, a little girl about four years of age, ran out into the street and was struck and run over by the truck. As a result, it became necessary to amputate her left arm about three inches from the shoulder.

The testimony of all the witnesses substantially agrees in regard to the physical condition of the street and the presence of the children in the vicinity, but there was a conflict in regard to the rate of speed at which the truck was going, and the question of whether there were wagons and a buggy along the north side of Hastings street near the curbstone.

The chauffeur's testimony was to the effect that there were two wagons and a buggy; that the little girl ran out from in front of the horse attached to the buggy; she was about eight feet from him when he saw her; he used the emergency and foot brakes, and did all he could to stop the car; he could make an emergency stop in about twenty feet; she was about ten feet behind the car when it stopped; his helper was blowing the whistle; when he entered Hastings street he was going about twelve miles an hour, but before the accident he slowed down to eight miles an hour. He was corroborated by the testimony of his helper, who, however, said that he did not see the little girl until after

the accident. He was also corroborated by a policeman, who said that the truck was going at a slow rate of speed, and that there was a large crowd of little children running across the street to hear the band.

The witness Stein, for the plaintiff, testified that there were no wagons or buggy near the place of the accident; the little girl was about ten feet from the curbstone when she was struck; he did not hear any horn or bell; there was a band playing on the other side of the street.

Alice Duchholz saw the accident from a window; said the car was going ten or twelve miles an hour; there were no buggies or vehicles along the north side of the street; the truck ran about fifteen or twenty feet beyond the place of the accident. Her testimony was corroborated by that of one Leffman.

Counsel for defendant contends that the evidence did not establish any negligence on its part. The undisputed evidence showed the gross weight of the loaded truck was about nine and one-half tons, and its momentum was, of course, the product of its mass by its velocity. The latter factor is in dispute, as plaintiff's witnesses say it was going from ten to twelve miles an hour, while defendant's say it was going from seven to eight miles an hour. All agree, however, that there were many little children in the street in the vicinity of the truck, attracted by the playing of a band. The speed at which a truck or other vehicle may be driven without negligence must depend in each instance upon the facts and circumstances of the case. As there was, in this case, a conflict in the evidence, and as the question of whether the defendant was negligent was properly one for the determination of the jury, and as we are unable, after a

careful reading of the evidence as abstracted, to say that the verdict was against the clear weight of the evidence, we cannot set it aside.]

Defendant next contends that the jury should have been instructed as to the dismissal of the last three counts. A conclusive answer to that contention is that no such instruction was asked, and that the declaration as it existed at the time of the trial consisted of three counts only. In this same connection defendant insists it was error to say in an instruction, "if the defendant carelessly and negligently drove the auto-truck as charged in the declaration," that they should find the defendant guilty, insisting that this permitted the jury to find the defendant guilty on a count which had been dismissed. Our Supreme Court has expressly held that such an instruction is proper if there is evidence sustaining any count in the declaration, even though there be other counts which are defective or are not sustained by the evidence. (Chicago City Ry. Co. v. Foster, 208 Ill. 228; Schlauder v. Chicago & Southern Traction Company, 268 Ill. 184.) Moreover, the declaration referred to was the declaration as it existed at the time of the trial.

Defendant contends that one of the instructions ~~[illegible]~~ ~~[illegible]~~ in that ~~[illegible]~~ is erroneous ~~[illegible]~~ it allows a recovery "for all damages, present and future, if any, which from the evidence can be treated as a necessary and direct result of the injury complained of." Clearly, however, the phrase "can be treated as" is a limiting and qualifying phrase, and limits the damages to those that can be treated as a necessary and direct result of the injury complained

of, as distinguished from damage which might be the indirect consequence thereof. The qualification was proper, and favorable to the defendant.

Criticism that the instruction that if the jury believe "that any witness has wilfully and knowingly sworn falsely to any material element in this case, then they have a right to reject the entire testimony of this witness, except in these matters, if any there be, where his or her testimony is corroborated by other credible evidence or by facts and circumstances appearing in the case," on the ground that it does not leave the jury free to reject it in its entirety, is not well founded. The instruction is one that is constantly given, and has almost universally been approved. Moreover, we think it is not subject even to a technical criticism, for while the jury have the right utterly to reject the uncorroborated testimony of a witness who has testified falsely in regard to a material matter without weighing or considering it, it has, we believe, no right to reject his testimony upon a point where he has been corroborated, although they have, of course, the right, after weighing it, to say that in view of the falsity of his testimony on another point, it is entitled to no weight or credence; there is an obvious difference between rejecting and refusing to consider at all the uncorroborated testimony of a witness who has sworn falsely in regard to a material point, and the right, after consideration of his corroborated testimony, to say that, in view of the fact that he had sworn falsely, they do not give it weight or credence.

Counsel for the defendant criticise an instruction because "it purports to tell the jury what they should take into consideration in determining on which side is

the preponderance of the evidence, and refers to the number of witnesses testifying, without reference to the number of witnesses testifying for or against the various contested propositions in the case." Just what meaning the jury could have attached to the statement that they were to take into consideration the number of witnesses testifying, unless they interpreted it as meaning the number of witnesses testifying on one side or the other on a disputed question, counsel does not point out. We think the criticism of this instruction and likewise the criticism of the other instructions are without merit.

Defendant also contends that the jury should have been instructed that "if the child ran in front of the automobile so suddenly that the driver had no notice of any danger," etc., then the plaintiff cannot recover. The instruction was clearly bad, for it, in effect, limited the question of the driver's care to the very moment preceding the accident, and leaves out of view the question of whether the accident was the result of such negligent driving as made it impossible for the defendant's chauffeur to avoid the accident after he saw the child.

Defendant's witness Trent, a carpenter, was permitted to testify in regard to some measurements he had made in connection with the building in which the witness Buchholz was at the time of the accident. He was then asked, "Now from the point that you stood beneath that window the fourth window on Laflin street, on the southeast corner, and looking toward -- in the direction of the electric light pole northwest, will you tell the jury what part of the premises on the southwest corner were visible to you from that point?" Upon objection to this question the witness, counsel said, "I want to prove

by this witness that from a point directly beneath that window, looking in that direction that no part of the sidewalk in front of the butcher shop is visible from that place, and I believe that is the only way that can be proven." Defendant was permitted to show the physical facts in connection with the location, and the court indicated that no limitation would be put upon the scope of testimony offered for that purpose. We do not think the court erred in ~~restricted~~ refusing to the inquiry to what was "visible" to a witness at a certain point, particularly when that point was not the point from which the accident was viewed. The question of whether there was anything to obstruct the view between the window from which the witness saw the accident, and the place of the accident or some other place, counsel did not choose to ask, although such an inquiry would have been entirely within the scope of the court's ruling. We do not think the court abused its discretion in limiting the scope of the examination to the physical facts.

As we find no reversible error in the record, the judgment must be affirmed.

ATTEST:

As we find no reversible error in the record, the judgment must be affirmed.

No. [illegible]

[illegible] A. [illegible], a minor by [illegible], his next friend and [illegible] ad litem,
Complainant and [illegible]
Appellant,

vs.

[illegible],
Defendant and [illegible]
Appellee.

[illegible]

1931.A. 555

Mr. [illegible] delivered the opinion of the court.

This appeal was taken by complainant below from an order allowing the defendant temporary alimony and solicitor's fees. Complainant, a minor, by his father and next friend, had exhibited his bill of complaint relating that he was 17 years of age, that while under the age of 17, a marriage ceremony was performed between the complainant and the defendant, that immediately upon the performance of the ceremony complainant and defendant separated, that the marriage was never consummated that the parties never entered into the marriage state nor lived together as man and wife, and that said marriage was never ratified by complainant in any manner thereafter, and therefore he asked that the marriage be declared null and void. The answer of the defendant admitted the marriage, asserted its validity, averred that defendant and plaintiff lived together as man and wife, and that as a result of the marriage two children were born; that defendant was living separate and apart from complainant without any fault on her part, that complainant had abandoned her and neglected and refused to contribute to the support of herself and children. Thereafter, she filed her cross-bill containing allegations similar to those in her answer, and asked that her husband be ordered to provide

for her support and maintenance and for the support and maintenance of said children, and alleged that she was then dependent for support upon the charity of her friends; that complainant was employed as a bank clerk, receiving at least $[illegible] a week, that he was a strong, healthy man, able to provide for and support complainant and her children, and asked for separate maintenance and for temporary solicitor's fees. The cross bill was sworn to. The affidavits of the complainant, his father and mother, very strongly sustained the allegations in the bill, and tended to show that he was attending school, and not engaged in any business.

Upon reading the bill of complaint, cross bill, answers and affidavits, the court entered an order allowing temporary alimony and solicitor's fees, from which the complainant appealed upon the ground that the court was without authority to enter it, for the reason that defendant was not complainant's wife, because the marriage was void, and if only voidable, had long since been repudiated by the complainant. This contention cannot be sustained, as the word "wife" in section 19 of the Divorce Act, which authorizes the court to require the husband to pay the wife such sum or sums as may enable her to maintain or defend the suit, and alimony during the pendency of the suit, where it is just and equitable, has been construed by this court in Green v. Green, 1[illegible] Ill. App. 465, to be a convenient word of designation not confined to those lawfully married. In that case, the complainant sought a divorce on the ground that at the time of her marriage the defendant had another wife living; defendant appealed from an order to pay solicitor's fees on the ground that as the marriage was absolutely null and void, it created no such relation as

husband and wife. Mr. Justice Gallizier, in affirming the order, said, p. 447:

> "We are of opinion that section 13, aforesaid, not only in terms applies to all cases of divorce, but that it was the intention of the legislature to confer upon the court the discretionary power to allow solicitor's fees and temporary alimony in any case where a decree of divorce is authorized by said section one. The words 'husband' and 'wife' used in section 13, are words of designation. They are sometimes from necessity or convenience employed in that sense when there is no lawful, but only a de facto relation of husband and wife subsisting. It is so in the statute defining bigamy. 'Whosoever, having a former husband or wife living, marries another person or continues to cohabit with such second husband or wife in this State, shall be adjudged guilty of bigamy.'"

The conclusion of the distinguished jurist is clearly sound. It may be noted also that the word "divorce," as used in the statute, is not confined to the annulment of lawful marriages, but embraces suits brought to declare the nullity of illegal marriages, even when void *ab initio*. An examination of section 13 of the statute likewise shows that the term "wife or wives" there used, includes those who have entered into void marriage contracts, while section 13 itself applies to all cases of divorce, and is not confined by terms or reason to bills brought for divorce for the causes set out in section 1.

Complainant further contends that the chancellor was not justified in allowing alimony and solicitor's fees upon the showing made by the defendant. Affidavits were presented upon the side of the complainant tending to show that the marriage was invalid. The answer and answer cross bill of the defendant set up a state of facts which, if true, would have rendered the marriage of unmarried nullity. In this state of the record we think the action of the chancellor is fully sustained by that in said in *Leifschneider v. Leifschneider*, 141 Ill. 17,

where the court, speaking through p. Justice Carter, said:

> "Appellant contends that the trial court improperly ordered the payment of temporary alimony when the fact of the marriage was in dispute. Appellant's answer to the rule to show cause why he should not pay this alimony admitted the fact of the marriage ceremony but denied its validity. Temporary alimony pendente lite may be allowed without a marriage being proved, though a prima facie case should be required to be shown on behalf of the wife. (2 Am. & Eng. Ency. of Law, - 2d ed. - p. 191, and cases there cited.) The marriage ceremony being admitted and only the legality questioned, the court was justified in allowing temporary alimony. It is no objection to the allowance of alimony pending the wife's bill for separate maintenance that the husband denies the facts alleged by her. The court may, if it deems necessary, enter into a sufficient examination to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings. Harding v. Harding, 144 Ill. 288; Cooper v. Cooper, 156 Id. 189."

The propriety of the action in allowing alimony, then, did not depend at all upon the question of whether there was or was not a valid marriage, but only upon the question of whether a prima facie showing had been made. In Lyman v. American Bonding & Trust Co., 158 Ill. App. 288, the court said, at page 289:

> "It does not follow that because the Circuit Court decided that the complainant in that case was not the wife of appellant upon the order for temporary alimony and solicitor's fees was improperly entered, or that the chancellor was not fair in the validity when the final decree was entered." (Citing Jenkins v. Jenkins, 91 Ill. 167, and Green v. Green, supra.)

Counsel next contends that the chancellor was as he had not attained his majority without jurisdiction to enter an order in personam without service of process on the cross bill for separate maintenance. We think this point is clearly without merit. The complainant, who had been a party to a marriage ceremony, exhibited her bill in chancery

which sought to have the marriage annulled. It is a familiar principle that no one may invoke the aid of a court of equity without submitting himself to its jurisdiction, and a necessary incident to the filing of a bill in equity is the right of the defendant, after answer filed, to exhibit a cross bill asking for affirmative relief. The complainant having voluntarily subjected himself to the jurisdiction of a court of equity, the chancellor was empowered by section 19 to enter proper orders respecting alimony and solicitor's fees, notwithstanding the minority of the complainant.

For the reasons stated, the order must be affirmed.

AFFIRMED.

No. 7[illegible].

[illegible] and
[illegible],
Appellees,

vs.

[illegible]
Administrator of the
Estate of [illegible],
Deceased,
Appellant.

APPEAL FROM
[illegible]
[illegible]
[illegible].

198 I.A. 558

Mr. JUSTICE [illegible] delivered the opinion of the court.

This appeal is prosecuted by the administrator of the estate of [illegible], deceased, the one the defendant below, to reverse the action of the municipal court in denying his motion to vacate a judgment entered August 8, 1918, by confession against his decedent for $2,000 and $500 attorney's fees on a judgment note dated Chicago, August 3, 1917, for $2,000, payable 30 days after date to the appellees. An order was entered October 17, 1918, allowing the entry of a action on behalf of defendant's administrator to vacate the judgment, and setting the hearing for October 28, 1918. On the same day appellant filed his petition reciting the giving of the judgment note by his decedent August 8th, 1918, for $2,000, and alleging upon information and belief that his decedent, on August 8th, 1917, and for a long time prior thereto, and from thence until her death on August 16, 1918, was an habitual drunkard, and under medical treatment therefor; that on said 8th day of August and for a long time prior thereto and from then until her death, her reason, mind and memory had been broken down by a long continued course of excessive indulgence in intoxicating drinks; that for a long time prior thereto she was so frequently and continually intoxicated that she did not clean her flat or cook it; it is alleged, nor the things used by her, and that for two weeks prior

On August 4th, her condition had been such that she was unable to leave the flat; that appellee knew her condition and with intoxicating liquors and that her condition was such that said appellee must have known that she was about to die shortly thereafter; that the 6th day of August 1?, on account of and because of the consumption of intoxicating liquors, of alcoholic of the liver; that she was, on the 6th day of August, mentally incompetent to execute the note in question or to transact business; that at the time of signing the note she did not know the nature of the instrument signed by her, and that it was executed without any valuable consideration given therefor; that she did not there fore represent that she had signed it, and that said note was fraudulently obtained by the appellee. Appellee further represented that his first information or knowledge of these facts was obtained in July, 1911, when the attorney for one Lucille Grayle, a minor, and Louise Coleman Weir, the only heirs at law of the deceased, informed him of them; that he verily believes that he has a good defense, and asks that the judgment be set aside and vacated, and that he have leave to file an affidavit of defense, and tenders the sum of $?.00 costs TO a jury.

Richard [illegible] Weir's affidavit states that he is a brother-in-law of the deceased; that she died August 1?, 1911, and had been for several months prior thereto addicted to the habitual use of intoxicating liquors and drinks; that on August 5, 1911, her condition of mind and body was such as to make her absolutely incapable of transacting any business whatever. For several months prior to her death, affiant saw her at intervals of one or three times a week, and he knew of said appellee who was under

the influence of some interested, and at no time made any mention of executing the note herein and she is known that her financial circumstances were, and verily believes that she was not indebted to the complainant or either of them in any amount whatever; he is informed and believes that shortly prior to the 4th day of August she directed the drawing of a will, leaving her estate to her mother and sister, and the only reason said will was not executed was that for about one week prior to, on and after said 4th day of August, 1913, she was mentally incapable of transacting business and was not of sound and disposing mind and memory; that she had $800 in the bank at the time of her death; that plaintiffs had frequently taken articles from her flat without her consent, and within one day of her death, they moved from the building without any notice whatever to her sister Louisa Meier or this affiant; that neither he nor his wife were aware of the execution of the note in controversy until the last week in July, 1914, when they were informed by their attorney that he had just ascertained that a claim had been allowed in the Probate Court based on said note; that affiant immediately began a diligent search for evidence bearing on the execution of said note; and on August 31, 1914, was appointed executor of Lucille Kreplin, a minor, by the Probate Court.

The affidavit of Gustav Vedel, a physician and surgeon, states that affiant attended the deceased during the year 1913 at various times, among others, August 28 and 7th, and on those dates she was intoxicated and suffering from cirrhosis of the liver caused from and by the excessive use of intoxicating drinks, and that she died on August 16, 1913, as a result, to the evidence of

affiant. It is consistent use of intoxicating drinks that is his opinion, based upon the condition in which he found her at previous times, and especially her condition during the 7th and 9th, and at between those times, mentally incapable of transacting business.

Walter J. Lindhoff in his affidavit stated that he paid weekly rent to the decedent some time prior to her death; that on Mar. 3, 1937, she told him she was unable to go downtown to get any money and would be write her some so anybody else could get money for her; that from June 14 to August 6, the date of the last delivery, he delivered 14 dozen bottles of beer; that he did not see her after July 7th, but was told by Mrs. Lucy Tiedler, one of the plaintiffs, that she was unable to get out of the house, and that she was drunk one half of the time; and that she drank quite a bit of whiskey which he got for her in a bottle; that every time affiant saw her for the last few months before her death, she appeared to be under the influence of intoxicating drinks, and had a very poor memory.

Johanna Miehe's affidavit stated that she saw the decedent for three months prior to her death on an average of once every ten or twelve days; the last time she called the apartment was disorderly and in an unclean condition and a large number of dishes were unwashed; she frequently cleaned the flat and washed the dishes for her; and on or about the 7th day of August, in her opinion, decedent was not capable of transacting business or of understanding the nature and effect of a judgment note.

Frank J. Heinlein, an attorney, stated in his affidavit that he had called upon decedent at her request at her home on the 1st, 2d, 3d, 4th, 5th, 6th, and 7th days of August, 1937, for the purpose of drawing a will

the bar; on each of the occasions and on each of said days she was intoxicated to such an extent and degree as to be absolutely unable to transact business of any kind or nature whatsoever; and on each of said occasions her mental faculties appeared to litigant to be impaired to such a degree as to render her mentally and physically helpless.

Upon reconsidering this petition and these affidavits, the court denied the motion to set aside the judgment and permit the petitioner to set up a defense.

It is the well settled law of this state that where timely application is made to set aside a judgment entered by confession, it is the duty of the court to allow the defendant to plead if a meritorious defense is shown by proper affidavits. (White v. Lacey, 54 Ill. 417; Illinois Transportation Co. v. Northern Prism Co., [illegible] Ill. 515; Hirsch Co. v. Thompson, [illegible] Ill. App. [illegible].)

The statements set out in the affidavits presented to the court below, if true, disclosed a state of facts which would warrant a jury in finding that the decedent was not, at the time she signed the note, capable of understanding the nature of the transaction. The affidavits of her lawyer and her physician are particularly explicit upon that point. As the affidavits, therefore, set up a meritorious defense, the remaining question is as to whether there was laches in presenting the application to set the judgment aside. It will be noted that this judgment note was obtained by the appellees on the [illegible] of August, and was payable [illegible] days after that date. From the following day, appellees entered a judgment for the full amount of the note, and [illegible] attorney's fees, although there had been no default in the payment of the note, and by its terms it had [illegible] days yet to run. The affidavits disclose that neither of the heirs at law of the decedent

had any knowledge of the existence of the note until the last week in July, 1941; that they immediately brought it to the attention of the administrator, and began a diligent search for evidence bearing on the execution of the note. Upon judgment by default is entered against an individual he must, of course, promptly take steps to set it aside. For the facts connected with the execution of the note are peculiarly within his knowledge. The administrator, however, is not in the same position, and he is not required. nor it would not be proper for him, to make application to a court to set aside a judgment by default until he had obtained or there had been presented to him affidavits disclosing a meritorious defense. In view of the fact that in order to present the defense set out in the affidavits it was necessary to locate and interview a number of witnesses, and in view of the time ordinarily necessary to a painstaking investigation of a matter of this kind, we are unable to say that there has been any laches either on the part of the heirs at law or of the administrator. In addition it must be noted that one of the heirs at law is a minor. In view, then, of the character of the evidence presented by affidavits, we are of the opinion that the court erred in refusing to grant the judgment and permit the appellant an opportunity to make a defense. The order will, therefore, be reversed and the cause remanded.

64 - 80398

J. C. PENNOYER COMPANY,
a corporation,
Defendant in Error.

vs

EUGENE WENDNAGEL & WILLIAM WENDNAGEL,
co-partners doing business as
WENDNAGEL & CO.,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 566

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The defendant in error brought suit in the Municipal Court of Chicago against the plaintiffs in error for $75. The case was tried by the court without a jury, and judgment was entered in favor of defendant in error for the amount claimed. To reverse this judgment the case is brought to this court. For convenience the parties will hereafter be designated plaintiff and defendants as in the court below.

In October, 1912, plaintiff was under contract with the South Halsted Street Iron Works to haul a steel girder from the latter's place of business, located on South Halsted street, to the Alaska Theatre, located on 31st street. To do this work it required twelve horses and five men. On the morning of October 1, 1912, plaintiff's men and horses went to the South Halsted Street Iron Works to load the girder. When they arrived there they found a Mr. Carter, who was in the employ of the defendants. The girder was loaded on a wagon and taken to the Alaska Theatre, but on account of some obstruction in the alley near the theatre, plaintiff was unable to deliver the girder at the place desired. Plaintiff's men, after waiting a reasonable time, informed Mr. Carter, who had accompanied them to the theatre, that they would not allow their teams and men to wait any longer; that unless the girder was unloaded

3. C. Dempsey concurs,
a dissenting,
Defendant is error,

so

ORDER REVERSED & WILLIS DISMISSED.
co-defendants being treated as
VIRGINIA & WV.

Plaintiff is entitled to

1.A. Sec

W. DUNCAN DISSENTING: Followed the opinion of the court.

The defendant is error through suit in the Municipal Court of Kanawha against the plaintiff in error for $75. The case was tried by the court without a jury, and judgment was entered in favor of defendant in error for the amount claimed. To reverse this judgment the case is brought to this court. The defendant in the justice will hereafter be designated plaintiff and defendant as in the court below.

In October, 1919, plaintiff was under contract with the South Bluefield Street Car Works to haul a chest cooler from the Lazier's plant of Charleston, located on South Kanawha street, to the Alamo Theatre, located on Hay street. To do this work it required twelve horses and five men. On the morning of October 1, 1919, plaintiff's man and horses went to the South Bluefield Street Car Works to load the cooler. When they arrived there they found a Mr. Carter, who was in the employ of the contractor. The driver was issued on a wagon and taken to the Alamo Theatre, but on account of some construction in the alley near the theatre, plaintiff was unable to deliver the cooler to the Alamo Theatre. Plaintiff's man, after a lasting a reasonable time, informed Mr. Carter, who had accompanied them to the theatre, that they could not allow their horses and men to wait any longer that morning for getting the unloaded

at once, plaintiff would charge $25 per hour for any further delay. Thereupon Carter went to a nearby telephone, and shortly afterwards returned and told the plaintiff's men if they would wait until the girder could be delivered at the proper place, they would be paid for such delay. Plaintiff's men waited for three hours before they could deliver the girder, and this suit was brought to recover for the three hours' delay, at $25 per hour.

One of the defendants testified that Mr. Carter was in their employ; that he was primarily an estimator on steel contracts; that he lived near the Alaska Theatre, and that he was instructed to go to the theatre three mornings each week and inspect the work and see how it was getting along. The witness further testified that Carter was not authorized by the defendants to make any agreement with the plaintiff's men in their behalf. From the state of the record, it does not appear who was responsible for the delay, nor to whom Carter telephoned, nor who Carter said would pay for the delay; nor does it appear what connection the defendants had with the Theatre Company, the plaintiff or the South Halsted Street Iron Works. After a careful consideration of all the evidence in the record, we are clearly of the opinion that the finding and judgment are not sustained by the evidence. The judgment of the Municipal Court will therefore be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

[illegible]

79 - 21049

AARON ANDERSON,
Defendant in Error,

vs

H. A. REITER, doing business as
H. A. REITER & COMPANY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 581

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff (defendant in error) brought suit in the Municipal Court of Chicago against the defendant (plaintiff in error) for $92.50. The case was tried before the court without a jury, and to reverse a judgment for $92.50 in favor of the plaintiff, the defendant prosecutes this writ of error.

The defendant is a real estate broker, and as such sold certain real estate on behalf of the plaintiff. $200 of the purchase price was paid to the defendant by the purchaser, which the defendant claims as his commission. Plaintiff contends that the defendant's commission was to be 2½ per cent of the selling price, or $107.50, and therefore $92.50 of the amount paid to the defendant belongs to the plaintiff. The evidence tends to show that the plaintiff called at the defendant's office, June 3, 1914, in reference to the sale of the real estate. The defendant and his salesman Karrer were present. The amount of commission which the defendant was to charge was discussed.

The plaintiff testified that the defendant said his commission would be $200; that the plaintiff said this was too much, and that he would only pay $100; that the defendant said that $100 was not even 2½ per cent; that thereupon plaintiff said if defendant would not take 2½ per cent he (plaintiff)

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff (defendant in error) brought suit in the Municipal Court of Chicago against the defendant (plaintiff in error) for $50.00. The case was tried before the court without a jury, and it rendered a judgment for $50.00 in favor of the plaintiff, the defendant prosecutes this writ of error.

The defendant is a real estate broker, and on such suit sertain real estate on behalf of the plaintiff. $500 of the purchase price was paid to the defendant by the purchaser, which the defendant claims is his commission. Plaintiff contends that the defendant's commission was to be 5% per cent of the selling price, or $487.50, and therefore $37.50 of the amount paid to the defendant belongs to the plaintiff. The evidence tends to show that the plaintiff called at the defendant's office, June 3, 1914, in relations to the sale of the real estate. The defendant had his salesman Kerton were present. The amount of commission which the defendant was to charge was discussed.

The plaintiff testified that the defendant said the commission would be $500; that the plaintiff said this was too much, and that he would only pay $450; that the defendant said that $500 was not even 5% per cent; that thereupon plaintiff said if defendant would not give it per cent as (plaintiff)

would not sign the contract; that the defendant said, "Well, I guess we will have to take that," and that then the plaintiff signed the contract for the sale of the property for $4300; that later the deal was closed at Kranz's office, and that he then asked the defendant where the $200 deposit was, and the defendant stated that Mr. Karrer had it; that on the afternoon of the same day plaintiff went to the defendant's office and met Mr. Karrer and asked him for the difference between $200 and 2½ per cent of the selling price, which was refused on the ground that the commission agreed upon was $300.

The defendant and his salesman both testified that a few weeks prior to the time in question, they had sold for the plaintiff a flat building; that the plaintiff received as part of the consideration for said flat building the piece of real estate above referred to; that in that deal the defendant wanted $400 commission, which the plaintiff refused to pay, but finally agreed to pay $300, and further stated that if the defendant sold the real estate mentioned in the contract above referred to he would pay $300 commission; that in that transaction the plaintiff signed a written agreement to pay the defendant $300; that on June 2, when the plaintiff called at the defendant's office, he asked what commission the defendant was to charge and was informed that it would be $200 as the plaintiff had theretofore agreed; that the plaintiff said he would not pay that amount; that he first said he would pay $80, then $100, and then 3½ per cent of the selling price; that thereupon the defendant stated that he would sell to the prospective purchaser a piece of property owned by another person in lieu of the plaintiff's property; that the plaintiff then said, "Well, all right, draw up the contract, and I will pay the $200;" that the defendant then drew up the contract which was signed. The amount of the commission,

would not sign the contract; that the defendant said, "Well, I guess we will have to take that," and that then the plaintiff signed the contract for the sale of the property for $4500, this later the deal was closed at Bryant's office, and that he then asked the defendant where the $500 deposit was; and the defendant stated to Mr. Barrer that it; that on the afternoon of the same day plaintiff went to the defendant's office and met Mr. Barrer and asked him for the difference between $500 and $1 per foot of the selling price, which was refused on the ground that the commission agreed upon was $500.

The defendant and his witnesses both testified that a few weeks prior to the time in question, they had met for the plaintiff a flat building; that the plaintiff received as part of the consideration for said flat building the place of real estate listed relying on; that in that deal the defendant needed $100 commission, which the plaintiff refused to pay, but finally agreed to pay $500, and further stated that if the defendant with the real estate mentioned in the contract above referred to he would pay $500 commission; that in that transaction the plaintiff signed a written agreement to pay the defendant $500; that on June 9, when the plaintiff called at the defendant's office, he asked what commission the defendant was to charge and was informed that it would be $500 as the plaintiff had therefore agreed; that the plaintiff said he would not pay that amount; that he first said he would pay $50, then $100, and then $1 per foot of the selling price; that thereupon the defendant stated that he would sell in the alternative furthermore a piece of property owned by another person in lieu of the plaintiff's property; that the plaintiff then said, "Well, all right, drew up the contract, and I will pay the $500;" that the defendant then drew up the contract which was signed. The amount of the commission

however, was not written in the contract. Defendant further testified that after the deal was closed at Kramer's office, plaintiff said, "Don't I get any of that $300;" and defendant said, "Mr. Karrer has that, I haven't;" that on the afternoon of the same day, plaintiff called at defendant's office and there met Mr. Karrer and demanded the $99.50, which was refused.

From the foregoing, it clearly appears that the only question in this case is one of fact. The court saw and heard the witnesses in open court, and unless we can say that the finding is clearly and manifestly against the weight of the evidence, the judgment should not be disturbed. We have carefully examined all the evidence in the record, and are unable to say that the finding of the court is clearly and manifestly against the weight of the evidence. The judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

Lawsey, was not written in the testator. Talmadge further testified that before the Earl was signed at Tompkins's office, plaintiff said, "Don't I get any of that" and defendant said, "Yes. Harper has that, I guess;" that on the afternoon of the same day, plaintiff called at defendant's office and there met Mr. Harper and received the $20.00, which was returned.

From the foregoing, it clearly appears that the only question in this case is one of fact. The court has not heard the witnesses in open court, and unless we can say that the finding is clearly and manifestly against the weight of the evidence, the judgment should not be disturbed. We have carefully examined all the evidence in the record, and we cannot so say that the finding of the court is clearly and manifestly against the weight of the evidence. The judgment of the Municipal Court will therefore be affirmed.

affirmed.

91 - 21061.

EDWARD A. GLENDE,
Plaintiff in Error,

vs.

H. SPRANER, trading as
Wicker Park Garage,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

198 I.A. 584

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This was an action of the fourth class brought in the Municipal Court of Chicago by the plaintiff in error (hereinafter called the plaintiff) against the defendant in error (hereinafter called the defendant) to recover damages for the loss of a motorcycle valued at $225. The case was tried before the court without a jury, and the issues were found against the plaintiff. A judgment was entered against the plaintiff for costs, and this writ of error followed.

The defendant was the owner and proprietor of the Wicker Park Garage, located at 1616 North Hoyne avenue, Chicago. The plaintiff was the owner of the motorcycle involved in this case. On the afternoon of May 31, 1914, plaintiff and one Frank Schmidt were riding said motorcycle along North avenue. As they were nearing defendant's garage, the drive chain of the motorcycle broke, and plaintiff and Schmidt then pushed the motorcycle into defendant's garage to repair the chain. They worked for some time but were unable to fix the chain, and, a storm having arisen

31 - 1250.

KEARNS A. GLEASON,

Plaintiff in Error,

vs.

E. [illegible], trading as
Wisher Park Garage,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1931 A. 584

Mr. Justice O'Connor delivered the opinion of the court.

This was an action of the fourth class brought in the municipal court of Chicago by the plaintiff in error (hereinafter called the plaintiff) against the defendant in error (hereinafter called the defendant) to recover damages for the loss of a motorcycle valued at $250. The case was tried before the court without a jury, and the issues were found against the plaintiff. A judgment was entered against the plaintiff for costs, and this writ of error follows.

The defendant was the owner and proprietor of the Wisher Park Garage, located at 1310 North Hoyne Avenue, Chicago. The plaintiff was the owner of the motorcycle involved in this suit. On the afternoon of May 21, 1924, plaintiff and one Frank Schmidt were riding said motorcycle along North Avenue. As they were nearing defendant's garage, the drive chain of the motorcycle broke, and plaintiff and Schmidt then pushed the motorcycle into defendant's garage to repair the chain. They waited for some time but were unable to fix the chain, and, a storm having arisen

in the meantime, plaintiff decided to leave the motorcycle in the garage over night, which he did with the permission of the defendant. The plaintiff stated that he would call for it the next day. Some time during the next day, a man called at defendant's garage and presented a written order signed by the plaintiff directing the defendant to "give this gentleman permission to inspect" the motorcycle. Defendant complied with plaintiff's directions, and while the man was inspecting the motorcycle he mounted it and rode away. Plaintiff arrived at the garage immediately after the man had gone and demanded the motorcycle. He was told that the motorcycle had been delivered to the man who presented plaintiff's written order; that he had just left with it, and would probably be back in a few minutes. Plaintiff waited around the garage for a while, but the man did not return, and the plaintiff was never able to recover possession of his motorcycle.

The plaintiff contends that there was an express contract by which he agreed to pay the defendant 50 cents for keeping the motorcycle over night, and that therefore the defendant was a bailee for hire. The defendant denies that there was any such agreement, and contends that he permitted the plaintiff to leave the machine as an accommodation and that he was a mere gratuitous bailee.

We are of the opinion that the evidence in this case is ample to sustain a finding by the court, as a matter of fact, that the defendant permitted the plaintiff to leave his motorcycle in the garage over night in order to accommodate the plaintiff, without any agreement as to compensation, in which case the defendant was a mere gratuitous bailee, and was liable for gross negligence only, or a want of slight

In the meantime, plaintiff decided to leave the motorcycle in the garage over night, which he did with the permission of the defendant. The plaintiff stated that he would call for it the next day. Some time during the next day, a man called at defendant's garage and presented a written order signed by the plaintiff directing the defendant to "give this gentleman permission to inspect" the motorcycle. Defendant complied with plaintiff's direction, and while the man was inspecting the motorcycle he mounted it and rode away. Plaintiff arrived at the garage immediately after the man had gone and demanded the motorcycle. He was told that the motorcycle had been delivered to the man who presented plaintiff's written order; that he had had left with it, and would probably be back in a few minutes. Plaintiff waited around the garage for a while, but the man did not return, and the plaintiff was never able to recover possession of his motorcycle.

The plaintiff contends that there was an express contract by which he agreed to pay the defendant 50 cents for keeping the motorcycle over night, and that therefore the defendant was a bailee for hire. The defendant denies that there was any such agreement, and contends that he permitted the plaintiff to leave the machine as an accommodation and that he was a mere gratuitous bailee.

In spite of the opinion that the evidence in this case is ample to sustain a finding by the court, on a matter of fact, that the defendant permitted the plaintiff to leave his motorcycle in the garage over night in order to accommodate the plaintiff, without any agreement as to compensation in which case the defendant was a mere gratuitous bailee, and was liable for gross negligence only, or a most of slight

care or diligence. Gray v. Merriam, 148 Ill. 179. The plaintiff does not contend that the defendant was guilty of gross negligence, nor does the evidence sustain such theory.

But, even if we assume that the court adopted plaintiff's theory of the case, and that the evidence is sufficient to sustain a finding that there was a contract for compensation, and that the defendant was therefore a bailee for hire; still, if the defendant used ordinary care to prevent the loss, he cannot be held liable. Standard Brewery v. Bemis & Curtis Malting Co., 171 Ill.602; Cloyde v. Steiger, 139 Ill. 41.

The plaintiff in this case showed a delivery of the motorcycle to the defendant and a failure on the part of the defendant to re-deliver the same to the plaintiff. This was sufficient to make out a prima facie case of negligence against the defendant, and it then devolved upon the defendant to show that he had exercised the degree of care required by the nature of the bailment. But, where it appears that the goods bailed have been lost, stolen or destroyed by fire, the law will not presume negligence, and the onus or burden of proving the same passes to the bailor. Nichols v. Union Stock Yards & Transit Co., 193 Ill. App. 14. The undisputed evidence in this case clearly shows that the motorcycle in question was stolen. It therefore devolved upon the plaintiff to show that defendant failed to use ordinary care to prevent the theft.

The plaintiff admits that he had advertised the motorcycle for sale, and the evidence tends to show that he so informed the defendant, and left his name and address at

core of dispute. Henry v. Kirkham, 188 Ill. 478. The plaintiff does not contend that the defendant was guilty of gross negligence, nor does the evidence sustain such theory.

But, even if we assume that the jury adopted plaintiff's theory of the case, and that the evidence is sufficient to sustain a finding that there was a sufficient for compensation, and that the defendant was therefore a bailee for hire; still, if the defendant used ordinary care to prevent the loss, he cannot be held liable. Standard Brewery v. Chicago & Western Indiana Co., 171 Ill. 294; Pierce v. Dickens, 134 Ill. 12.

The plaintiff in this case proves a delivery of the motorcycle to the defendant and a failure on the part of the defendant to re-deliver the same to the plaintiff. This was sufficient to make out a prima facie case of negligence against the defendant, and it then devolves upon the defendant to show that he had exercised the degree of care required by the nature of the bailment. But, since it appears that the goods bailed have been lost, stolen or destroyed by fire the law will not presume negligence, and the onus or burden of proving the same passes to the bailor. Bishop v. Union Stock Yards & Transit Co., 193 Ill. App. 54. The unsatisfactory evidence in this case clearly shows that the motorcycle in question was stolen. In circumstances devolved upon the plaintiff to show that defendant failed to use ordinary care to prevent the theft.

The plaintiff admits that he had advertised the motorcycle for sale, and the evidence tends to show that he or informed the defendant, and left his name and address at

the garage on the evening of May 31st, and requested the defendant to permit anyone to inspect the motorcycle whom he might send around. The man who stole the motorcycle presented to the defendant the following written order:

> "Kindly give this gentleman permission to inspect my motorcycle which was left with you last night.
>
> Edward A. Glende."

The plaintiff admits that he signed this order and gave it to a man whom he had never seen before and has never seen since. It also appears from the evidence that the plaintiff informed the defendant that the drive chain had a few links missing and that the machine could not be operated until the same was repaired. We have carefully considered all the evidence in the case, and under all the facts, we are clearly of the opinion that the plaintiff failed to show that the defendant did not use ordinary care, and that the court correctly decided this case on the law and the evidence.

The judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

the garage on the evening of Jan. 22nd, and requesting the defendant to permit Joyce to inspect the motorcycle when he might send around. The one who stole the motorcycle presumed to be defendant the following written order:

> "Kindly give this gentleman permission to inspect my motorcycle which was left with you last night.
>
> Edward A. Brooks."

The plaintiff claimed that he signed that order and gave it to a man whom he had never seen before and has never seen since. It also appears from uncontroverted that the plaintiff informed the defendant that the drive chain was a few links missing and that the machine could not be operated until the same was replaced. In view carefully considering all the evidence in the case, and under all the facts, we are clear of the opinion that the plaintiff failed to show that the defendant did not use ordinary care, and that the court correctly decided this case on the law and the evidence.

The judgment of the municipal court will therefore be affirmed.

22132

OSCAR MUTZ and BERTHA MUTZ,
Appellees,

vs.

OSCAR BRONFENBRUNNER and HENRIETTA NEWTON,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

198 I.A. 587

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from an order denying a motion to dissolve a preliminary injunction. The bill seeks to remove clouds and asks for an accounting. The parties will be designated complainants and defendants as in the court below.

The motion came on for hearing on the face of the verified amended bill, and must therefore be treated as a demurrer to the amended bill and the case decided upon the face of the same. Bolander v. City of Chicago, 216 Ill. 114.

The complainants filed their bill and afterwards, by leave of court, made a number of amendments. The amendments are all incorporated in one document. The better practice, however, in such cases is to require that an engrossed bill be filed. While the bill as amended is very loosely drawn, yet, so far as material to the question now under consideration, we are able to gather from it that the complainants, on January 3, 1913, purchased property known as 2101 Leland avenue, Chicago, and paid for the same; that the property is improved with a two-story brick building; that the complainant, Oscar Mutz, in 1907, employed the defendant,

Oscar Brodfuehrer, as his agent to look after some real estate matters; that the complainants from time to time purchased different parcels of real estate and were represented in said transactions by said Brodfuehrer; that the latter continued to act in said capacity from 1907 until the filing of the bill in this case; that since the purchase of the Leland Avenue property the same has been occupied by tenants; that the defendant Brodfuehrer as agent for the complainants has collected the rents from such tenants; that the defendants conspired to cheat and defraud the complainants out of said property and in furtherance of said conspiracy, on or about 11th day of September, 1913, forged the complainants' names to a trust deed to said premises, purporting to secure an indebtedness of $1000; that the said trust deed is a forgery and should be removed as a cloud; that afterwards, on or about April 25, 1914, the defendants in furtherance of said conspiracy to cheat and defraud the complainants out of said property forged the complainants' names to a warranty deed conveying the Leland Avenue property; that said deed was filed for record in the recorder's office, Cook County, Illinois, on August 10, 1915; that the recorder of Cook County is about to deliver said warranty deed to the defendants; that the only way that complainants can show that said warranty deed is a forgery is by producing the original in court; that from 1907 to the time of the filing of the bill the defendant Brodfuehrer collected rents for the complainants derived from several different parcels of real estate in Chicago and has failed to properly account for the same. The bill prays for an accounting; that the trust deed and warranty deed be removed as clouds; that the

recorder be enjoined from delivering the warranty deed, and that the defendants be enjoined from attempting to exercise any acts of ownership over the property, etc., and for general relief.

The defendants first contend that this being a bill to remove clouds, and the premises in question being improved, an allegation that the complainants are in possession is essential, and that the bill as amended contains no such allegation, and is therefore fatally defective. The contention announces a correct statement of the law. We are of the opinion, however, that in view of the allegations as above set forth the bill as amended does aver that the complainants are in possession.

The next contention is that to warrant an injunction on the face of a bill it must be verified, and that the verification to the amendments to the bill is insufficient. The affidavit is as follows: "Oscar Metz being sworn states upon oath he has heard read the above and foregoing amendment and known the contents thereof and that the statements therein made by him and complainants are true and he subscribed his name to the same." The objections urged to this are that this affidavit which appears at the foot of the document consisting of eleven different amendments to the bill, refers to but one amendment, and therefore it is impossible to determine to which amendment affiant refers; that the word "statements" as used in the affidavit is ambiguous and that no distinction is made between matters stated positively and those upon information and belief. The objection that the affidavit refers to but one of the eleven amendments is hypercritical rather than meritorious. All of the amendments are in one document, and

[illegible] to original form delivering the warranty deed, and that the defendants be enjoined from attempting to execute any sale of contingent over the property, etc., and for general relief.

The defendants first contend that this being a bill in equity [illegible], and the pleading is demurrable being improper, an objection that the complainants are in possession in ejectment, and that we will be bended [illegible] in such situation, and is in effect, falsely [illegible]. The complainants [illegible] a material element of the [illegible]. In view of the opinion, however, that in view of the situation we cannot set forth the bill, we consider that [illegible] pleadings are in [illegible].

The court contention is that in [illegible] an injunction of the type of a bill it must be verified, and that the verification to the complaint in the bill is insufficient. The sufficiency is as follows: "Your Affd being sworn states upon oath to the same from the above and foregoing complaint and among the contents therein and that the statements therein made by him are true and to be established the same to be true." The objection urged is that the bill affirmatively which appears on the face of the document containing of alleged illegal [illegible] to the bill, refers to the complaint, and therefore it is impossible to determine to which [illegible] affiant refers; that the word "statements" as used in the affidavit is ambiguous and that no distinction is made [illegible] between material [illegible] and [illegible] information and belief. The objection that the affidavit refers to the [illegible] one of the [illegible] [illegible]

the affidavit refers to all of them. The objection to the word "statements" as used in the affidavit is without merit; so also is the objection that no distinction is made between positive statements and those upon information and belief. Under the facts we think the affidavit is sufficient. The next objection urged is that the court, as a part of the order denying the motion to dissolve the preliminary injunction, ordered that the rents of the property in question be impounded with the clerk of the court; that this was in effect the appointment of a receiver, and that under the statute, before a receiver may be appointed, the complainants must first give bond unless good cause is shown why such bond should not be given, and that no such cause was shown and no bond was given; that the impounding of the rents was, therefore, erroneous. That part of the order objected to is as follows: "It is further ordered that the rents collected or to be collected from the premises known as 3161 Leland avenue by either party to this cause from and after the 23rd day of August, A. D. 1915 be impounded with the clerk of this court until the final disposition of this cause." We think that this order was not in effect the same as the appointment of a receiver. The bill avers that the complainants are the owners in fee simple of the property; that they are in possession and entitled to the rents derived from the same, and on the record these allegations are admitted to be true. It therefore appears that the defendants could in no way be injured by the order of the court. Furthermore, no objection was made to the impounding of the rents and for aught that appears from the record it may have been by agreement.

the affidavits relate to all of them. The objection is the
word "substantive" as used in the affidavit is without merit
or cause in the objection that the distribution is made between
political interests and their upon interventions are valid.
Under the facts as to the affidavit is sufficient. The
main objection urged is that the money, as a part of the
estate, during the period is directive the probationary im
pounding, argues that the order of the probate in question
be impounded with the state of the county that this was in
effect the appointment of a receiver, and that under the
statute, before a receiver may be appointed, the complaint
must first give bond under such terms as the court may
such bond should be given, and that be such terms as
shall be so bond was given; that the impounding of the
was, in effect, appointment. That part of the order objected
to is as follows: "It is further ordered that the proceeds
collected or to be collected from the property known as Bill
Indian Jewelry by either party in this case from and after
the 22nd day of August, A. D. 1922 be impounded with the clerk
of this court until final disposition of this cause." We
think that the order was not in effect the same as an appoint
ment of a receiver. The bill alleges that the complainants are
the owners in fee simple of the property; that they are in
possession and entitled to the profits derived from the same,
and on the record these allegations are admitted to be true.
It is certain contends that the injunction would in no way be
injured by the order of the court. Furthermore, no objection
was made in the pleadings of the trial as to the amount that
accrue from the record it may have been by stipulation.

Finding no reversible error in the record, the order of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

537 - 20870

WILLIAM DOROTHY, Trustee in Bankruptcy of the R. K. Maynard Piano Company, a corporation, bankrupt,
Appellant,

vs.

COMMONWEALTH COMMERCIAL COMPANY and NORTHERN TRUST COMPANY,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

198 I.A. 601

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill for the redemption of certain accounts, notes, contracts and papers in the possession of the defendant Commonwealth Commercial Company, which it is alleged were delivered to said defendant as collateral security for loans of money made by this defendant to the R. K. Maynard Piano Company, of which complainant, William Dorothy, is trustee in bankruptcy. The bill prayed for an accounting and asked that upon payment of the amount found due from the Maynard Company all its indebtedness to the Commonwealth Company be declared extinguished and that said accounts, notes, etc., be delivered to complainant and decreed to belong to the Maynard Company and to complainant as trustee for the same. Upon hearing by the chancellor the bill was ordered dismissed for want of equity. From this complainant appeals.

The transfer of the accounts, notes, etc., from the Maynard Company to the defendant was effected under four contracts. Complainant contends that these contracts, rightly construed, show the transaction to be a transfer of collateral as security for loans. The defendant Commonwealth Company contends that they are what in form they appear to be - bona fide sales.

WILLIAM DOROTHY, Trustee in Bankruptcy of the R. K. Maynard Piano Company,
Appellant,

vs.

[illegible] COMMERCIAL COMPANY and NORTHERN TRUST COMPANY,
Appellees.

ALBERT, 1st DIST. 1930
CON. T, SUP. COURT.

MR. PRESIDING JUSTICE [illegible]

DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill for the recaption of certain accounts, notes, contracts and papers in the possession of the defendant Commonwealth Commercial Company, which it is alleged were delivered to said defendant as collateral security for loans of money made by this defendant to the R. K. Maynard Piano Company, of which complainant, William Dorothy, is trustee in bankruptcy. The bill prayed for an accounting and asked that upon payment of the amount found due from the Maynard Company all its indebtedness to the Commonwealth Company be declared extinguished and that said accounts, notes, etc., be delivered to complainant entitled to belong to the Maynard Company and to complainant as trustee for the same. Upon hearing by the chancellor the bill was ordered dismissed for want of equity. From this complainant appeals.

The transfer of the accounts, notes, etc., from the Maynard Company to the defendant was effected under four contracts. Complainant contends that these contracts, taken as a whole, show the transaction to be a transfer of collateral as security for loans. The defendant commonwealth company says that they are what in form they appear to be - sales like

We are of the opinion that the Supreme Court of this state has decided this question for us, in the opinion filed on February 16, 1916, in the case of Mercantile Trust Company v. L. H. Kestor. Respective counsel in the case before us are entirely familiar with the issues and history of that case. The contracts before us are structurally like the one considered in that case and differ from it in no substantial respect. Following the Supreme Court, we hold that the transactions between the Maynard Piano Company and the defendant Commonwealth Company were loans, with the accounts, etc., transferred as collateral security.

We are of the opinion that the dealings between the Maynard Company and the Commonwealth Company constituted one continuous transaction. These dealings were never closed. The making of the yearly contracts bore no particular relation to periods of time; they were merely incidental to the continuous business. All the transactions are subject to investigation. Jenkins v. International Bank, 97 Ill. 568.

Although these contracts are illegal, being ultra vires, it would be unjust to hold that complainant, who has received money under them, should not account for it, and the law implies a contract to return what has been received. Complainant should be required to return the money advanced to the Maynard Company by the Commonwealth Company, together with legal interest. Leigh v. American Brake-Beam Co., 205 Ill. 147. Section 11 of the Interest statute, which says that corporations may not interpose the defense of usury, has no application to this case. Union National Bank v. L. N. A. & C. Ry. Co., 145 Ill. 208, and Farwell v. Meyer, 35 Ill. 40, are authority for holding that the rate of interest upon any obligations of either

We are of the opinion that the Supreme Court of this state has decided this question for us, in the opinion filed on February 16, 1916, in the case of Mercantile Trust Company v. E. M. Kastor. Respective counsel in the case before us are entirely familiar with the issues and history of that case. The contracts before us are structurally like the one considered in that case and differ from it in no substantial respect. Following the Supreme Court, we hold that the transactions between the Bayard Piano Company and the defendant Commonwealth Company were loans, with the accounts, etc., transferred as collateral security.

We are of the opinion that the dealings between the Bayard Company and the Commonwealth Company constituted one continuous transaction. These dealings were never closed. The making of the yearly contracts bore no particular relation to periods of time; they were merely incidental to the continuous business. All the transactions are subject to investigation. Jenkins v. International Bank, 97 Ill. 268.

Although these contracts are illegal, being ultra vires, it would be unjust to hold that complainant, who has received money under them, should not account for it, and the law implies a contract to return what has been received. Complainant should be required to return the money advanced to the Bayard Company by the Commonwealth Company, together with legal interest. Leigh v. American Brake-Beam Co., 308 Ill. 147. Section 11 of the Interest statute, which says that corporations may not interpose the defense of usury, has no application to this case. Union National Bank v. J. M. A. & G. Ry. Co., 143 Ill. 308, and Parwell v. Lever, 38 Ill. 40, are authority for holding

party in this case to the other which lawfully should bear interest shall be at the legal rate provided in the absence of a contract - that is, 5 per cent.

Complainant is entitled to an accounting and to a return of the collateral upon payment to the Commonwealth Company of whatever may be found due it from the Maynard Piano Company, with interest.

The decree of the Superior Court is reversed and the cause remanded for further proceedings not inconsistent with what is said herein.

REVERSED AND REMANDED.

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Lidgerwood Mfg. Company,
Appellee.

vs.

No. 6.
March Term, 1915

S. R. H. Robinson & Son Contracting Company,
Appellant.

198 I.A. 604

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. W. E. Hadley.

Term No. 6 Agenda No. 61.

March Term, 1915.

Ridgewood Manufacturing Company, Appellee,	
vs.	Appeal from
G. R. H. Robinson & Son Contracting Company, Appellant.	M-A-D-I-S-O-N

Opinion by Higbee, P. J.

This is an appeal from a judgment entered by the circuit court of Madison county, upon a trial wherein the jury was waived, in favor of appellee and against appellant, for the sum of $33,000.83, on May 22, 1914.

The suit grows out of the following state of facts; On May 25, 1910, appellant, a corporation having its principal office in St. Louis, Missouri, purchased of appellee, a corporation, engaged in the manufacture and sale of machinery, having its principal place of business in New York City and a branch office in Chicago, Illinois, through G. H. Crawford, Sr., the manager of its Chicago office, three Ridgewood-Crawford Scraper Bucket Excavators, twobeing of Class B-F, at $10,000 each or a total of $20,000 and one of class C at $17,500. the whole contract amounting to $37,500. On September 22, 1910, appellant gave to G. H. Crawford, Sr.

Term No. 6

Agenda No. 21.

[illegible], 1919.

Ridgewood Manufacturing Company,
[illegible],
[illegible],
v. R. H. Robinson & Son Contracting
Company,
Respondent.

A-D-I-D-C-X

Opinion by Hughes, P. J.

This is an appeal from a judgment entered by the circuit court of Marion county, upon a trial wherein the jury was waived, in favor of appellee and against appellant, for the sum of $33,000.82, on May 22, 1912.

The suit grows out of the following state of facts: On May 23,1910, appellant, a corporation having its principal office in St. Louis, Missouri, purchased of appellee, a corporation, engaged in the manufacture and sale of machinery, having its principal place of business in New York city and a branch office in Chicago, Illinois, through R. H. Crawford, Sr., the manager of its Chicago office, three Ridgewood-Crawford Scraper Tucker scavators, twelve of Class B-1, at $10,000 each or a total of $120,000 and one of class C at $17,500, the whole contract amounting to $137,500. On Sep-tember 22, 1910, appellant gave to C. H. Crawford, Sr.

upon this contract, $5,000 in cash and five promissory notes of that date, payable to appellee, two for $5,000 each and three for $3,333.33 each. One of said notes for $5,000 was to fall due On October 12 and the other November 12, 1910 and the three notes for $3,333.33 matured respectively on November 12, December 12 and January 12, following the date thereof and all the notes drew interest at the rate of six per cent per annum. The $5,000 note which matured October 12, 1910 was paid but no further payments have been made upon the purchase price of said excavators, and appellee brought this suit to recover the amount claimed by it to be due and unpaid, the same being the amount of the four unpaid notes with the interest thereon, the balance of the contract price not represented by the notes and a bill for castings, machinery and material claimed to have been furnished appellant, in erecting, repairing and maintaining said excavators.

The declaration, filed May 9, 1911, contained eight counts. The first four counts declared on the four notes above referred to. The fifth and sixth were common counts for goods sold and delivered. The seventh counted on the consolidated counts for money loaned, paid and expended, had and received, and for interest, work and material. The eighth was for money due on an account stated. The judgment recovered included the sum of the unpaid notes amounting to $15,000, interest upon the same from the date thereof to the date of judgment at

upon this contract, $5,000 in cash and five promissory notes of that date, payable to appellee, two for $5,000 each and three for $3,333.33 each. One of said notes for $5,000 was to fall due on October 12 and the other November 1, 1910, and the three notes for $3,333.33 matured respectively on November 1, December 12 and January 12, following the date thereof and all the notes drew interest at the rate of six per cent per annum. The $3,000 note which matured October 12, 1910 was paid but no further payments have been made upon the purchase price of said excavator, and appellee brought this suit to recover the amount claimed by it to be due and unpaid, the same being the amount of the four unpaid notes with the interest thereon, the balance of the contract price not represented by the notes and a bill for cartage, machinery and material claimed to have been furnished appellant, in erecting, repairing and maintaining said excavator.

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six per cent per annum, $3500, the balance of the purchase price for the excavators not included in the notes, $12,500 and an open account for supplies furnished appellant amounting to $3200.83, making a total of $34,000.83 against which a credit of $1000 was allowed by the court for damages.

In the first trial of this cause the notes in question were not sought to be recovered on but were introduced as evidence to prove the amount of the account stated ($29,867,52) and judgment was entered for that amount. Upon appeal to this court that judgment was reversed and the cause remanded, (183 Ill. App. 431) and reference is hereby made to the opinion of the court in that case for a copy of the contract sued on and other material facts necessary to give a clear conception of the issues involved. Among other matters and things therein determined were, that appellant had a right to show what was said by the parties at the time the written contract was entered into, not for the purpose of varying its expressed terms but to determine the design and intention of the parties in making the contract as shown by the surroundings and circumstances under which the contract was entered into; that the contract was for whole machines and not separate parts of different machines, and therefore appellant should have been permitted to intrroduce evidence to show if possible the parts furnished would not fit together, that it was necessary to make certain changes in the parts and the amount of

six per cent per annum, $2500, the balance of the purchase price for the excavators not included in the notes, $12,500 and an open account for supplies furnished appellant amounting to $2500.82, making a total of $34,000.82 against which a credit of $1000 was allowed by the court for damages.

In the first trial of this cause the notes in question were not sought to be recovered on but were introduced as evidence to prove the amount of the account stated ($29,867.82) and judgment was entered for that amount. Upon appeal to this court that judgment was reversed and the cause remanded. (183 Ill. App. 431) and reference is hereby made to the opinion of the court in that case for a copy of the contract and on and other material facts necessary to give a clear conception of the issues involved. Among other matters and things therein determined were, that appellant had a right to show what was said by the parties at the time the written contract was entered into, not for the purpose of varying its expressed terms but to determine the design and intention of the parties in making the contract as shown by the surroundings and circumstances under which the contract was entered into; that the contract was for whole machines and not separate parts of different machines, and therefore appellant should have been permitted to introduce evidence to show if possible the parts furnished would not fit together, that it was necessary to make certain changes in the parts and the amount of

damages accruing to appellant on account of such changes. The court also held that the written contract did not necessarily preclude appellant from the benefit of any implied warranty there would have been in the absence of a written contract, that the excavatorswere manufactured in a workmanlike manner and reasonably adapted to the purpose for which they were manufactured. Alsothat if any subsequent contract was made at the time the notes were given and the $5000 paid, that appellee would complete the machines and make them satisfactory and fit to do the work for which they were purchased, appellant had the right toshow such facts. On the second trial of the case, the court below proceeded in harmony with the views expressed in said opinion and heard evidence as to whether there were defects in the excavators as completed machines, as to what was necessary, if anything, to make them complete and render them suitable for the work for which they were purchased, as to what extent if any, they were defective when completed and the damage to appellant, if any there was, by reason of improper manufacture. Evidence was also heard as towhat the subsequent contract made at the time the notes were given was and what had been done in regard thereto. Twenty forty days were consumed in the trial of this cause in the court below. The record filed here is composed of over 3000 type written pages in addition to numerous exhibits, and the briefs, argument and abstracts cover over 1300 pages. It is therefore evident that this court should not discuss the proofs

damages according to appellant on account of such change. The court also said that the written contract did not necessarily preclude appellant from the benefit of any implied warranty that would have been in the absence of a written contract, that the excavators were manufactured in a workmanlike manner and reasonably adapted to the purpose for which they were manufactured. Although if any subsequent contract was made at the time the notes were given and the $3000 paid, that appellee would complete the machines and make them satisfactory and fit to do the work for which they were purchased, appellant had the right to show such fact. In the second trial of the case, the court below proceeded in harmony with the views expressed in said opinion and heard evidence as to whether there was defects in the excavators as completed machines, as to what was necessary, if anything, to make them complete and render them suitable for the work for which they were purchased, as to what extent if any, they were defective when completed and the damage to appellant, if any there was, by reason of improper manufacture. Evidence was also heard as to what the subsequent contract made at the time the notes were given was and what had been done in regard thereto. Some forty days were consumed in the trial of this cause in the court below. The record filed here is composed of over 3000 typewritten pages in addition to numerous exhibits, and the briefs, argument and abstracts cover over 1300 pages. It is therefore evident that this court should not discuss the proofs

in detail and consider all the numerous questions raised, unless it should find it to be absolutely necessary to do so for the proper disposition of the case. We have given the case a careful consideration and find it is not necessary to discuss here all the questions raised by counsel to properly decide the same, and will therefore confine this opinion to a discussion of those material matters which, when determined, appear to fully dispose of the questions whether the judgment was rightfully entered in favor of appellee and whether the record pertaining to ~~xxxxx~~ those matters necessary to be established to entitle appellee to a recovery, was free from substantial error.

A great amount of evidence was produced on the part of appellant for the purpose of showing it had been delayed in its work and damaged by reason of late shipments of parts of machinery; by the improper construction of parts of the excavators so they would not fit together and by defects in the material used in their construction; also to show that the excavators were not capable of doing the work contemplated by appellant. The claims of appellant in regard to these matters were controverted by appellee, and on its part a very large amount of evidence was introduced to show that such faults in construction and machinery as appeared , were of minor importance; that the parts when received, were not properly taken care of; that the excavators were erected and managed without proper

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care or skill and that such delay and damages as were occasioned, were to be attributed to a large decree to appellant's own neglect and mismanagement. All evidence was heard subject to objection and the court held, among other things in propositions of law offered byappellee, that under the original contract appellee was not liable for damages suffered by appellant on account of delays and that its liability for damages on account of defective material, was only where such defects developed under normal and proper use within thirty days after starting the excavators to work and in that case they were limited to the cost of replacing such defective parts, in case appellee did not replace the same, plus the loss or damages which were shown to have been the material and proximate result of such failure; that Hugh Glenn the erector, who was furnished under that provision of the contract providing that appellee would furnish a competent man to superintend the erection and starting of the excavators, was the employe of appellant and that appellee was not liable for any act, omission to act, default or negligence on his part in erecting or starting said excavators. The court further held that if appellee delivered to appellant excavators of the kind ordered by and substantially corresponding with those described in the contract, then appellee was entitled to recover the contract price less a certain credit of $1000 allowed by appellee at the time the notes were executed and such

care or skill and that much delay and damages as were occasioned, were to be attributed to a large degree to appellant's own neglect and mismanagement. All evidence was here subject to objection and the court held, among other things in proposition of law offered appellee, that under the original contract appellee was not liable for damages suffered by appellant on account of delays and that its liability for damages on account of defective material, was only where such defects developed under normal and proper use within thirty days after starting the excavators to work and in that case they were limited to the cost of replacing such defective parts, in case appellee did not replace the same, plus the loss or damages which were shown to have been the material and proximate result of such failure; that high lift the erector, who was furnished under that provision of the contract providing that appellee would furnish a competent man to superintend the erection and starting of the excavators, was the employe of appellant and that appellee was not liable for any act, omission to act, default or negligence on his part in erecting or starting said excavators. The court further held that if appellee delivered to appellant excavators of the kind ordered by and substantially corresponding with those described in the contract, then appellee was entitled to recover the contract price less a certain credit of $1000 allowed by appellee at the time the notes were executed and such

other allowances for repairs and alterations as were made by appellant with appellee's written consent or approval.

We are inclined to the opinion that the proofs upon the second trial, as a whole, showed that appellee had complied with the terms of the contract to be performed by it and that such damages as accrued to appellant were due in a large degree to the unskillfulness and negligence of its employes or to other matters over which appellee had no control, and for which it was not responsible. A careful consideration of the case discloses however that the settlement entered into between the parties on September 22, 1910 above referred to, was a potent factor in determining the question whether appellee was entitled to the judgment awarded it in the court below.

On September 21, 1910, C. N. Crawford, Jr., had ~~visited the work and~~ inspected the excavators. He testified that at that time he found the two B-F excavators in actual operation, that the boilers and gears thereof were in good and proper operative condition and that the erection of the C excavator had not yet been completed. Nothing had then been paid on the machines and Crawford requested ~~first~~ a payment. ~~be made. By agreement Crawford met Robinson the next day,~~ We September 22, at the office of the latter in St. Louis, Missouri, ~~where~~ the matter of a settlement was fully discussed. Robinson claimed

other influences for repairs and alterations as were made by agreement with appellee's written consent or approval.

We are inclined to the opinion that the proofs upon the second trial, as a whole, showed that appellee had complied with the terms of the contract to be performed by it and that such damages as accrued to appellant were due in a large degree to the unwillingness and negligence of its employees or to other matters over which appellee had no control, and for which it was not responsible. After careful consideration of the case, disclosing moreover that the settlement entered into between the parties on September 29, 1910 above referred to, was a potent factor in determining the question whether appellee was entitled to the judgment awarded it in the court below.

~~On October 29, 1910, [illegible] had visited the work and inspected the excavators. He testified that at that time he found the two H-3 excavators in actual operation, that the boilers and gears thereof were in good and proper or native condition and that the erection of the 6 excavator had not yet been completed. Nothing had then been paid on the machines and Crawford requested that a payment be made. By agreement Crawford met Collins upon the next day, September 30, at the office of the latter in St. Louis, Missouri, where the matter of a settlement was fully discussed. Robinson claimed~~

that ~~appellant~~ defendant had been at more cost in the erection of the machinery than was reasonable and that it had suffered other damages. Crawford was willing to make some allowances and as a result of the conference he allowed ~~appellant~~ defendant, and the latter accepted, as a credit upon the contract price, the sum of $1000 in settlement of all damages claimed ~~by appellant~~ to have been sustained up to that date. Thereupon Robinson paid plaintiff ~~appellee~~ $5000 in cash and gave ~~him the~~ a note for $5000 due October 10,1910, which has been paid, ~~as above noted,~~ and also the note for $5000 and the three for $3,333.33 each, sued on in this case. ~~There was no controverty but~~ disputed that the sum of $1000 was agreed upon ~~between the parties~~ in settlement of all claims for damages ~~made by appellant~~ up to that date, but it is contended by ~~appellee~~ plaintiff that such damages were agreed upon unconditionally, while the contention of ~~appellant~~ defendant is that this settlement was made on the express condition that ~~appellee~~ plaintiff would make the machines satisfactory and if the old ones did not give satisfaction would furnish new swinging engines, new gears and new boilers if necessary, and if ~~appellee~~ plaintiff failed to carry out this new agreement, the $1000 would not be accepted by appellant as the amount of damages it was entitled to. The only person present at ~~the~~ that time, ~~this new agreement or settlement was made,~~ in addition to Mr. Crawford and Mr. Robinson, was Mr. Bentzer, the secretary of ~~appellant~~ defendant, who to a large extent

that appellant had been at some pains in the
erection of the machinery, time was reasonable and
that it had suffered other damages. Crawford
was willing to make some allowance and as a result
of the conference he signed appellant, and the
latter accepted, as a credit upon the contract price,
the sum of $1000 in settlement of all damages
claimed by appellant to have been sustained up
to that date. Stevenson Johnson paid appellee
$5000 in cash and gave his note for $5000 due
October 15,1910, which has been paid, and
and also the note for $5000 and the three for
$3,333.33 each, sued on in this case. There was
no controversy but that the sum of $1000 was agreed
upon between the parties in settlement of all claims
for damages made to appellant up to that date, but
it is contended by appellee that that amount was
agreed upon unconditionally, while the contention
of appellant is that this settlement was made on
the express condition that the engine would make the
machines satisfactory and if the old ones did not
give satisfaction would furnish new winning ma-
chines, new gears and new boilers if necessary,
and if appellee failed to carry out this new
agreement, the $1000 would not be accepted by
appellant as the amount of damages it was entitled
to. The only person present at the time this
settlement or settlement was made, in addition
to Mr. Crawford and Mr. Johnson, was Mr. Dunbar,
the secretary of appellant, who is a long strong

corroborated Mr. Robinson and testified that Mr. Crawford absolutely agreed to furnish new boilers, for the B-C excavators. Mr. Crawford testified there was no discussion about gears or boilers on that day, and ~~he~~ denied that he agreed to furnish ~~appellant~~ defendant any new boilers or swinging engines or gears upon anycondition and he was corroborated by certain facts and circumstances which would tend to establish the improbability of such a contract being made. In this connection it was shown by ~~appellee~~ plaintiff, that at that time excavator C had not been completely erected and that ~~appellant~~ defendant [illegible] the erection. ~~Appellant~~ Defendant afterwards demanded new boilers of appellee, but none were furnished and the job was completed with those first installed. In themonth following the settlement, Mr. Crawford again visited the machines and stated he found them improperly cared for and operated. Subsequent to this visit one McMillan was sent down to overhaul them at ~~appellee's~~ plaintiff's expense, and the proof tends to show he left them in good repair. It also appears that a new set of gears was furnished by ~~appellee~~ plaintiff after the settlement was made, but the proof shows that they were of the same size and dimensions as the original bevel gears and were furnished as supply parts upon the order of ~~appellant~~ defendant and ~~appellee~~ plaintiff made a charge against ~~appellant~~ defendant for them.

The court sitting as a jury had the same opportunity of determining the credibility of witnesses and the samepower of determining where the

corroborated Mr. Robinson and testified that Mr. Crawford should [illegible] to Japan on his holiday, for the [illegible] Mr. Crawford testified there was no [illegible] or bribery on that day, and denied that he offered to furnish money or [illegible] or promising engines or [illegible] upon [illegible] corroborated by certain testimony [illegible] which could lead to establish the [illegible] such a contract [illegible] connection it was [illegible], that at that time Mr. Crawford [illegible] and that [illegible] the [illegible] bolters of [illegible], but none were furnished and the job was completed with [illegible] satisfaction. In the month following the [illegible], Mr. Crawford again visited the [illegible] and stated to [illegible] improperly [illegible] and operated. Subsequent to this visit one [illegible] was sent down to overhaul them at [illegible] expense, and the report tends to show he left them in good [illegible]. It also appears that a new set of gears was furnished by [illegible] after the settlement was made, but the proof shows that they were of the same size and dimensions as the original bevel gears and were furnished [illegible] supply parts upon the order of [illegible] [illegible] made a claim against [illegible] for [illegible].

The court sitting as a jury had the same opportunity of determining the credibility of witnesses and the somewhat of determining where the

preponderance of the evidence lay as a jury and we should give the same weight to its findings that we would to the verdict of a jury. Radalski V. Stone 186 Ill. 540; Nick V. The People 95 Ill. 78.

In arriving at the conclusion which it did, the court below in passing upon this settlement of September 22, must necessarily have decided either that there were no conditions attabhed to the making of the same, as claimed by appellee or that if the cash payment was made and the notes given, with the promise that the machinery would be made satisfactory and new boilers, swinging engines and gears furnished, if necessary, as claimed by appellant, then that appellee must have complied with these terms. Whether new boilers and new swinging engines were reasonably necessary, were questions of fact for the court and there was ample evidence to sustain a finding that they were not necessary, especially in view of the fact the proof tended to show that the workmen sent by appellee put the machines in good condition and that it appeared that the same boilers and engines were used until the job was finished. It is also clear that appellee could not rightfully be held responsible for any difficulty in operating the machines caused by the inexperience and neglect of appellant's employes. In our opinion theproofs were sufficient to have warranted the court below in finding that no conditions were attached to the settlement, but even if

preponderance of the evidence lay, we, a jury, and we should give the same weight to its findings that we would to the verdict of a jury. Indefski v. Crane 188 Ill. 240; Lick v. The People 56 Ill. 78.

In arriving at the conclusion which it did, the court below in weighing upon this settlement of Southwestern 28, must necessarily have decided either that there were no conditions attached to the making of the same, as claimed by appellee or that if the same payment was made and the notes given, with the promise that the machinery would be made satisfactory and new boilers, winding engines and gears furnished, if necessary, as claimed by appellant, then that appellee must have complied with these terms. Either new boilers and new winding engines were reasonably necessary, were questions of fact for the court and there was ample evidence to sustain a finding that they were not necessary, especially in view of the fact the proof tended to show that the workmen sent by appellee put the machines in good condition and that it appeared that the same boilers and engines were used until the job was finished. It is also clear that appellee could not rightfully be held responsible for any difficulty in operating the machines caused by the inexperience and neglect of appellants employes. As our opinion therefore were sufficient to have warranted the court below in finding that no conditions were attached to the settlement, but even if

there were such conditions, the proof was only that there was no such breach of the case as could be sufficient to defeat appellee's right of recovery. Upon the whole it appears to us that the trial court correctly found the facts in favor of appellee. We find no error in the rulings of the court in reference to the evidence affecting the material questions necessary to the decision of the case. The rulings in regard to the propositions of law submitted are not free from criticism, but as the judgment given by the court was correct, such rulings must be considered as harmless. Stowell V. Moore 89 Ill., 564. Fuchs v. Long Co. Vs. Whitredge 242 Ill. 88. Where it is apparent from the whole record that the judgment is right, an error committed by the court in holding propositions of law, is harmless and should not be ground for reversal of the judgment. Remous Manf. Co. V. Wilcox, 180 Ill. 246. Gathemann Vs. City of Chicago 263 Ill. 292.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of December, A. D. 1915.*

Clerk of the Appellate Court.

NOINI

1357

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and fifteen, the same being the 26th day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the 1st *day of December, A. D. 1915, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

198 I.A. 618

Melchior Leipold,
Appellant.

vs.

No. 68
March Term, 1915

Elbert Epler,
Appellee.

ERROR TO
APPEAL FROM

Circuit COURT

Edwards COUNTY

TRIAL JUDGE

HON. Wm. K. Green.

Term No. 68. Agenda No. 29.

In the

APPELLATE COURT,
State of Illinois
Fourth District,

March Term, A. D. 1915.

Melchior Leipold, Appellant,	
v.	Appeal from the Circuit
Albert Epler,	Court of Edwards County.
Appellee.	

J. C. McBride, J.

The plaintiff in the trial below sought to recover a judgment on a contract contained in a deed whereby the defendant was alleged to have assumed the payment of certain mortgages. The verdict of the jury and judgment of the Court was rendered against him, to reverse which, he prosecutes this appeal.

* It appears ~~from the record in this case that~~ the ~~appellant~~ plaintiff was the owner of ~~five hundred and eleven (511) acres of~~ land situated near the Saline River in Saline County, Illinois, ~~that he had purchased from one George Clark, and~~ upon which there were three mortgages, one for the amount of Four Thousand Dollars ($4000), one for Three Thousand Dollars ($3,000), and one for Eight

Term No. 68. Abstract of Opinion

In the

APPELLATE COURT,
Fourth District,

March Term, A. D. 1915.

Walnuter Lumber Co., Appellee, v. Albert Myler, Appellee,	Appeal from the Circuit Court of Edwards County.

A. J. Crisler, J.

The plaintiff in the trial below sought to recover a judgment on a contract contained in a deed whereby the defendant was alleged to have assumed the payment of certain mortgages. The verdict of the jury and judgment of the Court was rendered against him, to reverse which, he prosecutes this appeal.

It appears from the record in this case that the appellant was the owner of five hundred and eleven (511) acres of land situated near the Wabash River in Gallatin County, Illinois, which had mortgaged from one George Clark, and upon which there were three mortgages, one for the amount of Four Thousand Dollars ($4000), one for Three Thousand Dollars ($3,000), and one for Eight

Thousand Dollars ($8,000), for which ~~appellant~~ plaintiff was liable, either by having executed the notes secured by ~~said~~ the mortgages, or by having assumed the payment thereof.

On May 17, 1913 ~~appellant~~ plaintiff sold and conveyed the ~~aforesaid~~ land to the ~~appellee~~ defendant for a nominal consideration of Twenty-five Thousand Five Hundred and Fifty Dollars ($25,550) and conveyed ~~the same~~ it to ~~appellee~~ defendant by warranty deed. The deed making the conveyance contains the following statement: "The covenants of warranty in this deed contained are made subject to the mortgages on said land ~~as follows: 1. Terre Haute Trust Company, $4,000; 2. [illegible] Mitchel, $5,000; George T. Clark, $[illegible],000;~~ * * * and the accumulated interest on each of the above, which the grantee herein assumes and agrees to pay."

The sale of this land ~~to appellee~~ was effected by one ~~Robert L.~~ Gould, a cousin of ~~appellee.~~ defendant. ~~The~~ testimony ~~of appellee and his witnesses~~ tended to show that Gould was acting as the agent of ~~appellant~~ plaintiff in the consummation of this deal, and that he received ~~from appellant~~ a commission therefor; while ~~upon the other hand~~ the testimony of the ~~appellant~~ plaintiff and Gould ~~is~~ was that Gould did not at any time act as ~~the~~ sole agent ~~of appellant.~~ It further appeared ~~from the evidence~~ that upon the first efforts of Gould to trade with ~~appellee~~ defendant he was unable to consummate a deal and that he thereupon entered into a partner-ship with ~~appellee~~ defendant for

Thousand Dollars ($8,000), for which [illegible] was liable, either by having executed the notes secured by said mortgages, or by having assumed the payment thereof.

On May 17, 1913 appellant sold and conveyed the aforesaid land to the appellee for a nominal consideration of twenty-five thousand five hundred and fifty dollars ($25,550.00) and conveyed the same to appellee by warranty deed. The deed making the conveyance contains the following statement: "The covenants of warranty in this deed contained are made subject to the mortgages on said land as follows: [illegible] $1,000; [illegible] $1,000; and the accumulated interest on each of the above, which the grantee herein assumes and agrees to pay."

The sale of this land to appellee was effected by one [illegible] Gould, a cousin of appellee. The testimony of appellee and his wife [illegible] tends to show that Gould was acting as the agent of appellant in the consummation of this deal, and that he received from appellant a commission therefor; while upon the other hand the testimony of the appellant and Gould is that Gould did not at any time act as the agent of appellant. It further appears from the evidence that upon the first efforts of Gould to trade with appellee he was unable to consummate a deal and that he thereupon entered into a partnership with appellee for

the purpose of purchasing this land, ~~whereby it was agreed they would purchase the land together;~~ ~~Gould was a relative of appellee, and one in whom~~ the testimony shows ~~appellee~~ defendant reposed great confidence, both in his integrity and in his judgment, and after the arrangement was made ~~between him and Gould to purchase this land together~~ appellee defendant left the matter entirely to ~~the judgment of~~ Gould, and did not even go to see the land. Gould represented ~~to him~~ that it was a fine piece of corn land; four hundred acres of it in a high state of cultivation; three hundred acres had the stumps taken out, and that it over-flowed only in times of very high water; that there were no sloughs in it; and that the Saline river ran into it just enough to drain it good; that the improvements were good; and that it always grew good corn and was worth fifty dollars an acre; and that the plaintiff ~~appellant, when he purchased it~~, paid fifty dollars an acre for it. Gould closed ~~up~~ the deal with plaintiff ~~appellant~~, but there was ~~is~~ no evidence of any agreement having been made to assume the mortgages ~~indebtedness~~ previous to the making of the deed, ~~and~~ when plaintiff ~~appellant made the deed be~~ inserted therein the ~~foregoing~~ clause assuming said mortgages, and Gould then sent the deed to defendant ~~appellee~~ who retained it and did not ~~put it upon~~ record it for the reason, as he said, that Gould was ~~a~~ his partner ~~with him in the deal~~ and that his name was not in the deed ~~as one of the~~ grantees. Gould then informed the ~~appellee~~ defendant that a man ~~by the~~ name ~~of~~ Turrentine desired

the purpose of purchasing this land, whereby it was agreed they would purchase the land together; [illegible] the testimony above applies respecting conveyance, both in the property and in the [illegible], and after the arrangement was made between him and [illegible] the matter entirely to the judgment of Gould, and did not even go to see the land. Gould represented to him that it was a fine piece of corn land; four hundred acres of it in a high state of cultivation; three hundred acres had the stubs taken out, and that it over-flowed only in times of very high water; that there were no sloughs in it; and that the Saline river ran into it just enough to drain it good; that the improvements were good; and that it always grew good corn and was worth fifty dollars an acre; and that the applicant, when he purchased it, paid fifty dollars an acre for it. Gould closed up the deal with applicant, but there is no evidence of any agreement having been made to assume the mortgaged indebtedness previous to the making of the deed, and even [illegible] were the [illegible] inserted therein the [illegible] clause assuming said mortgage, and Gould then sent the deed to applicant who retained it and did not put it upon record, for the reason, as he said, that Gould was a partner with him in the deal and that his name was not in the deed as one of the grantees. Gould then informed the applicant that a man by the name of Turrentine desired

to purchase the land and that it could be traded to him for Thirty Thousand Dollars ($30,000) by taking some property in Kansas City and other places, ~~in on the deal~~, and that Gould said he knew the property and that it was good, and Gould also ~~at that time~~ said to appellee, "The deed is made to you, I admit that , but I will have a half interest in the land and rather than make another deed, you go ahead and do it as it was and I expect to get part of the property you were trading for."

It further appeared that a deal between Gould and Turrentine was consummated upon the judgment of Gould, and on the next day after this deal had been closed and the deed made, the deed from ~~appellant~~ plaintiff to ~~appellee~~ defendant was ~~placed upon~~ recorded. It further appeared that the property taken from Turrentine was of no value and that the property secured by ~~appellant~~ plaintiff from ~~appellee~~ defendant, in addition to the assuming of the said mortgages, was of the value of about Forty-Eight Hundred Dollars($4800) and that the Saline County land was of an inferior quality not in a good state of cultivation, and worth very much less than it had been represented.

It further appeared from the evidence that ~~at the expiration of~~ a year or so from the time of the making of ~~said~~ the deed by ~~appellant~~ plaintiff to ~~appellee~~ defendant that some of the principal and interest became due upon the mortgages referred to in the deed, and were not paid by the ~~appellee~~ defendant so ~~appellant~~ plaintiff proceeded

to purchase the land and that it could be traded to him for "Thirty Thousand Dollars" ($36,000) by taking some property in Tacoma City and other places in-on-the deal, and that Gould said to him the property, and that it was good, and Gould also said that he said to appellee, "The deed is made to you, I admit that, but I will have a half interest in the land and rather than make another deed, you go ahead and do it as it was and I expect to get part of the property you were trading for."

It further appears that a deal between Gould and Turrentine was consummated upon the judgment of Gould, and on the next day after this deal had been closed and the deed made, the deed from appellant to appellee was placed upon record.

It further appears that the property taken from Turrentine was of no value and that the property secured by appellant from appellee, in addition to the assuming of the said mortgages, was of the value of about forty-eight hundred dollars($4800) and that the Adline County land was of an inferior quality not in a good state of cultivation, and worth very much less than it had been represented.

It further appears from the evidence that at the expiration of a year or so from the time of the making of said deal, appellant, by agreement that some of the principal and interest became due upon the mortgages related to in the deal, and were not paid by the appellee to appellant, proceeded

to pay off one principal note of ~~Two Thousand Dollars ($2,000) and~~ several interest notes amounting in all to about Two Thousand Seven Hundred and Eighty Dollars ($2,780), ~~and it is to recover the amount so paid out by appellant that this suit was instituted.~~

The declaration consists of several special counts and the common counts, but each and all of them are based upon the foregoing clause assuming the mortgages as set forth in the deed made by the ~~appellant to appellee.~~ defendant. ~~In this declaration the appellee~~ plaintiff filed the plea of general issue, to which he attached a notice of special matters in defense- First, denying that the deed containing such clause was ever accepted by him, or that he assumed and agreed to pay the mortgages; second, that the transaction through which the ~~said~~ deed containing the ~~said~~ clause was obtained had been effected through the fraud and circumvention of ~~one Robert~~ Gould, as agent of the plaintiff, and that the deed was fraudulently made to ~~appellee~~ defendant, and that because of the fraud connected with the sale the contract sued on was void; and third, that the defendant never did receive any consideration for assuming and agreeing to pay plaintiff's indebtedness in the declaration mentioned.

To arrive at a correct conclusion in this case, it is necessary to determine to what extent, if at all, the foregoing clause contained in the deed made by appellant is binding upon the appellee.

to pay off one principal note of ~~two thousand~~ ~~dollars,~~ ~~and one several interest note~~ amounting in all to about Two Thousand Seven Hundred and Eighty Dollars ($2,780), ~~and it is to re-~~ ~~cover the amount so paid out by appellant that~~ this suit was instituted.

The declaration consists of several special counts and the common counts, but each and all of them are based upon the foregoing clause, assuming the mortgagee as set forth in the deed made by the appellant to appellee. In this declaration the appellee filed the plea of general issue, to which he attached a notice of special matters in defense: First, denying that the deed containing such clause was ever accepted by him, or that he assumed and agreed to pay the mortgage; second, that the transaction through which the ~~said~~ deed containing ~~said~~ clause was obtained had been effected through the fraud and circumvention of one ~~[illegible]~~ Gould, agent of the plaintiff, and that the deed was fraudulently made to ~~appellee~~ appellee, and that because of the fraud connected with the sale the contract sued on was void; and third, that the defendant never did receive any consideration for assuming and agreeing to pay plaintiff's indebtedness in the declaration mentioned.

To arrive at a correct conclusion in this case, it is necessary to determine to what extent, if at all, the foregoing clause contained in the deed made by appellant is binding upon the appellee.

"A contract to assume an incumbrance on land purchased is not one of the essential parts of a deed of conveyance; indeed such a contract is a stranger to a deed. * * * * The mere fact that Funk and his wife executed and accepted a deed, and inserted therein a clause that Funk should pay the mortgage named in the deed, would not create a personal liability upon him. In order to make the assumption clause in the deed binding and obligatory upon Funk, it was necessary to go one step further and show that he assented to that clause in the instrument." Thompson Vs. Dearborn et al., 107 Ill. 87.

"A contract to assume an incumbrance is not one of the essential parts of a deed; on the contrary it is extraneous and collateral to the conveyance. Such recital in the deed is not in and of itself sufficient to fix the liability to pay. Something more than this must be shown; the grantee is not estopped by the mere recitals of a deed he did not execute." Schmidt Vs. Merriman, 101 App. 443.

This is a collateral undertaking and if the promise fail or be shown to have been obtained by fraud or mistakenly made, such undertaking cannot be enforced. Schmidt Vs. Merriman, supra. It was contended by appellee upon the trial of this case, and is here insisted upon, that the foregoing was a simple contract and a collateral undertaking, and that if it was obtained by fraud or obtained under such circumstances as to make it

"A contract to assume an incumbrance or lend purchased is not one of the essential parts of a deed of conveyance; indeed such a contract is : strangeor to a deed. . . . . The mere fact that Hunk and his wife executed and accepted a deed, and inserted therein a clause that Hunk should say the mortgage named in the deed, would not create a personal liability upon him. In order to make the assumption clause in the deed binding and obligatory upon Hunk, it was necessary to go one step further and show that he assented to that clause in the instrument." Thompson Vs. Leavborn et al., 107 Ill. 87.

"A contract to assume an incumbrance is not one of the essential parts of a deed; on the contrary it is extraneous and collateral to the conveyance. Such recital in the deed is not in and of itself sufficient to fix the liability to pay. Something more than this must be shown; the promise is not estopped by the mere recitals of a deed he did not execute." Schmidt Vs. Zerriman, 107 Ill. 443.

This is a collateral undertaking and if the promise fail or be shown to have been obtained by fraud or mistakenly made, such undertaking cannot be enforced. Schmidt Vs. Zerriman, supra. It was contended by appellee upon the trial of this case, and is here insisted upon, that the foregoing was a single contract and a collateral undertaking, and that if it was obtained by fraud or obtained under such circumstances as to make it

fraudulent, then such contract is void and not enforcible, and we think this is the real question to be determined in this case. Appellant insists that this comes within the class of cases that even if there was a fraudulent representation of the value of the property, that it became the duty of appellee upon the discovery of such fraud to return the property and to demand a return of the consideration that he gave for it: or that if he kept the property his remedy then would be to sue for the damages, or that such damages could be recouped in an action to recover the purchase price. We do not believe that appellee is limited in this case to the doctrine of recoupment or of a suit for the return of the consideration, but that if the contract is fraudulent he may have the benefit of it to defeat appellant's entire action. As we have seen, this is a simple contract, and where the action is upon a simple contract, fraud is a good defense. Hovinson Vs. Yetter, 238 Ill. 320. Schmidt Vs. Merriman, supra.

"Fraud practiced by the party seeking the remedy, upon him against whom it is sought, and not that which is the subject matter of the action or claim, is universally held fatal to his title." Greenlief on Evidence, Vol. 1, Section 284.

If the appellant, by himself or his agent, procured the obligation here sought to recover upon, by false or fraudulent means, then he can receive no benefit from such fraud. The doctrine here invoked might be applicable if appellee

fraudulent, then such contract is void and not enforcible, and we think this is the real question to be determined in this case. Specifically inasmuch that this case falls within the class of cases that even if there was a fraudulent representation of the value of the property, that it became the duty of appellee upon the discovery of such fraud to return the property and to demand a return of the consideration that he gave for it: or that if he kept the property his remedy then would be to sue for the damage, or that such damage could be recouped in an action to recover the purchase price. We do not believe that appellee is limited in this case to the doctrine of recoupment or of a suit for the return of the consideration, but that if the contract is fraudulent he may have the benefit of it to defeat appellant's entire action. As we have seen, this is a simple contract, and there the action is upon a simple contract, fraud is a good defense.

[illegible] 2d. [illegible] 1. [illegible] v. [illegible], [illegible].

"Fraud practiced by the party seeking the remedy, upon the claimant upon it is sought, and not that which is the subject matter of the action or claim, is universally held fatal to his title." Greenleaf on Evidence, Vol. 1, Section 348.

If the appellant, by himself or his agent, [illegible] the [illegible] [illegible] [illegible] [illegible] upon, by false or fraudulent [illegible] means, then he can receive no benefit from such fraud. The doctrine here invoked might be applicable if appellee

was seeking to recover damages from appellant that may have accrued on account of such false representations, but in this case appellant is seeking to recover upon a collateral undertaking, and even though the acts of the agent in the procuring of this collateral undertaking were unauthorized, and if such obligation was procured by the unauthorized and fraudulent acts of the agent, then we do not believe that appellant should recover anything by reason of such unauthorized acts. In other words, he could not receive the benefit of the unauthorized acts of his agent if they were in fact fraudulent.

"This Court has held that where the principal actually receives the benefit of ~~xxxx~~ money procured by the unauthorized acts of its agent, the principal will be liable in the amount it has received the benefit of." Alton Manufacturing Co. Vs. Biblical Institute, 243 Ill. 298. Citing: First National Bank of Lasvegas Vs. Osborne, 125 Ill. 25; Faye Vs. Slaughter, 194 Ill. 157.

The evidence was conflicting ~~When the question~~ as to whether or not the plaintiff ~~appellant~~ and his agent were guilty of fraud in securing the obligation ~~were~~ sued upon, ~~the evidence was conflicting.~~ ~~It is true that appellant~~ and Gould both testified that plaintiff ~~appellant~~ had nothing ~~whatever~~ to do with this sale ~~and that the sale~~ which was effected by Gould as a broker and not as the agent of plaintiff ~~a broker~~, and that Gould's ~~the~~ representations ~~may have been made by Gould to appellee~~ were without

was seeking to recover damages from appellant that may have accrued on account of such false representations, but in this case appellant is seeking to recover upon a collateral undertaking, and even though the acts of the agent in the procuring of this collateral undertaking were unauthorized, and if such obligation was procured by the unauthorized and fraudulent acts of the agent, then we do not believe that appellant should recover anything by reason of such unauthorized acts. In other words, he could not receive the benefit of the unauthorized acts of his agent if they were in fact fraudulent.

"This Court has held that where the principal actually receives the benefit of ~~xxxx~~ money procured by the unauthorized acts of its agent, the principal will be liable in the amount it has received the benefit of. Alton Manufacturing Co. vs. Judicial Institute, 243 Ill. 298. Citing: First National Bank of Lawrence vs. Osborne, 125 Ill. 65; Lane vs. Chamberlin, 144 Ill. 610.

When the question as to whether or not the ~~appellant~~ and his agent were guilty of fraud in securing the obligation ~~here~~ sued upon, the evidence was conflicting. It is true that appellant and Gould both testified that ~~appellant~~ had nothing ~~to leave~~ to do with this sale ~~and that the sale was~~ effected by Gould as a broker and not as the agent of appellant, and that ~~whatever~~ representations ~~may have been made by Gould to appellee~~ were without

authority of ~~appellant~~ plaintiff ~~and should not in any manner affect his rights.~~

~~It appears from the testimony of appellee~~ defendant that ~~appellant~~ plaintiff, at one time, told ~~appellee~~ defendant that he employed ~~Mr.~~ Gould as his agent to dispose of this land and paid him for it, the payment being a half interest in the machine shop that ~~appellee~~ defendant put in the deal. ~~This conversation occurred in Mr. Gould's office in Mt. Carmel.~~ S. E. Quindry testified to having heard the ~~same~~ conversation. ~~He also stated that the appellant~~ plaintiff testified on a former trial that he turned over one-half of this machinery to Gould for making this deal. It also appears from the evidence that Gould showed the letters received by him from Epler to Leipold, and also told him what Epler said; and Gould was contradicted by Charles Marshal and Charles Naylor, who said that Gould stated that he was acting as the agent of Leipold ~~in this transaction~~, and that he could not get the deal finished and in order to complete it he had to take a half interest in it himself. ~~and there~~ There are many other circumstances connected with the transaction, which, in our opinion, would warrant the jury in finding that Leipold and Gould were working together in this transaction. When the first deed was delivered to appellee he refused to accept it because it was not made to appellee and Gould as joint owners. In a short time this was remedied and sometime during this period it appears that Gould told appellant what Epler said

authority of appellant and should not in any

[illegible] rights.

It appears from the testimony of appellee that appellant, at one time, told appellee that he employed Mr. Gould as his agent to dispose of this land and paid him for it, the payment being a half interest in the resulting gain that [illegible] out of the deal. This conversation [illegible]

[illegible]

G. E. Gundry testified to having heard the same conversation. He also states that the appellant testified on a former trial that he turned over one-half of this machinery to Gould for selling this deal. It also appears from the evidence that Gould showed the letters received by him from Pryor to Reigold, and also told him what Pryor said; and Gould contradicted by Charles Imbodl and Charles Taylor, who said that Gould stated that he was acting as the agent of Reigold in this transaction, and that he could not get the deal finished and in order to complete it he had to take a half interest in it himself. There are many other circumstances connected with the transaction, which, in our opinion, would warrant the jury in finding that Reigold and Gould were working together in this transaction. When the first deed was delivered to appellee he refused to accept it because it was not made to appellee and Gould as joint owners. In a short time this was remedied and possible during this period it appears that Gould told appellant what Pryor said

and showed him Apler's letters, and they were undoubtedly in consultation about this matter and the acceptance of the deed.

It further appears ~~from the evidence~~ that the land had been grossly misrepresented by Gould, both as to value and condition, and we think that appellant could not help but have known, under the conditions here shown to exist, that Gould was claiming to be a joint owner with Apler in this deal, and certainly knew that Apler had confidence in Gould, and if he was co-operating with Gould, as the jury seem to have found by their verdict, it would certainly be such a fraud upon the rights of appellee as to prevent appellant from benefiting by the transaction, at least, we are unable to say that the verdict of the jury was manifestly wrong in finding that this was a fraudulent scheme concocted by appellant and Gould and prosecuted for the purpose of obligating appellee to pay an amount far in excess of thevalue of the land that was deeded to him, to say nothing of the property that was turned over by him to appellant. We also think the jury were warranted in finding that appellee never assented knowingly and intentionally to the assuming of this mortgage and indebtedness. As it appears that the deed was placed on record and the conveyance made by appellee to Turrentine through a scheme of Gould that probably had for its object the fastening of this indebtedness upon appellee; and as it appears that in the deal made with Turrentine

and showed him Taylor's letters, and they were undoubtedly in consultation about this matter and the acceptance of the deed.

It further appears from the evidence that the land had been grossly misrepresented by Gould, both as to value and condition, and we think that appellant could not help but have known, under the conditions here shown to exist, that Gould was claiming to be a joint owner with Taylor in this deal, and certainly knew that Taylor had confidence in Gould, and if he was co-operating with Gould, as the jury seem to have found by their verdict, it would certainly be such a fraud upon the rights of appellee as to prevent appellant from benefitting by the transaction, at least, we are unable to say that the verdict of the jury was manifestly wrong in finding that this was a fraudulent scheme concocted by appellant and Gould and prosecuted for the purpose of obligating appellee to pay an amount far in excess of the value of the land that was deeded to him, to say nothing of the property that was turned over by him to appellant. We also think the jury were warranted in finding that appellee never assented knowingly and intentionally to the assuming of this mortgage and indebtedness. As it appears that the deed was placed on record and the conveyance made by appellee to Turrentine through a scheme of Gould that probably had for its object the fastening of this indebtedness upon appellee; and as it appears that in the deal made with Turrentine

the property received by Gould and appellee was worthless; and Gould all of this time so managed and manipulated the matters as to avoid becoming liable himself for this indebtedness, but all the time sought to create an obligation upon the part of appellee; and while there is no evidence directly connecting appellant with Gould in this matter; yet, under the circumstances and admissions made, we can not say that the jury were not warranted in finding that they were co-operating together, especially so, when appellant was so closely associated with Gould and was the one who was largely benefited by the deal. The jury heard the witnesses testify, and had an opportunity to see and observe their conduct and bearing while on the stand, and to know better from what occurred during the trial who was telling the truth about this matter than we can tell from this record, and if the witnesses of appellee were telling the truth about it, then the jury was warranted in finding as they did.

There is an objection made to appellee's instructions because they are framed on the theory that the presence of actionable fraud inducing damage to any extent is a complete defense to the plaintiff's cause of action. We agree with counsel that the instructions are framed upon this theory, and for the reasons above indicated, we are further of the opinion that the theory is a correct view of the law. It is said that the next to the last instruction given on behalf of the defendant

the property received by Gould and appellee was worthless; and could all of this time so managed and manipulated the matters as to avoid becoming liable himself for this indebtedness, but all the time sought to create an obligation upon the part of appellee; and while there is no evidence directly connecting appellant with Gould in this matter; yet, under the circumstances and admissions made, we can not say that the jury were not warranted in finding that they were co-operating together, especially so, when appellant was so closely associated with Gould and was the one who was largely benefited by the deal. Judgment heard the witnesses testify, and had an opportunity to see and observe their conduct and bearing while on the stand, and to know better from what occurred during the trial who was telling the truth about this matter than we can tell from this record, and if the witnesses of appellee were telling the truth about it, the jury was warranted in finding as they did.

There is an objection made to appellee's instructions because they are framed on the theory that the presence of actionable fraud inducing damage to any extent is a complete defense to the plaintiff's cause of action. We agree with counsel that the instructions are framed upon this theory, and for the reasons above indicated, we are further of the opinion that the theory is a correct view of the law. It is said that the court in the last instruction given on behalf of the defendant

should not have been given because there was no evidence of any kind to support the instruction. It is true, there was no direct evidence that appellant had anything to do with the subsequent conveyance to Turrentine, but if it was a fact, as the evidence tended to show, that Gould and appellant were co-operating together in the consummation of this deal, then there were such facts surrounding the transfer to Turrentine as to warrant the court in giving this instruction.

We have carefully read the record in this case, and can not say that the jury was not warranted in arriving at the conclusion that they did with reference to the facts in the case, or that the Court erred in its rulings and instructions, and the judgment of the lower court is affirmed.

Judgment affirmed.

Justice Hogue dissents.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 14 *day of December, A. D. 1915.*

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the ------17th------ day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

E. L. Brown,
Appellee.

vs.

No. 5.

October Term, 1915

John L. Paraham Hat Co.,
Appellant.

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Pope COUNTY

TRIAL JUDGE

HON. WARREN W. DUNCAN.

Term No. 5. October Term, 1915. Agenda No.1

R. L. Brown, Appellee	
v.	Appeal from Pope.
John T. Faraham Hat Company, Appellant.	

Opinion by Higbee, P. J.

-----o-----

Appellee claims a balance due him for salary, from appellant, a corporation doing business at Memphis, Tennessee, and to collect the same, swore out a writ of attachment before a justice of the peace in Pope county, Illinois, which he caused to be served on two of appellant's customers in that county. There was a judgment against the company from which an appeal was taken to the circuit court, where the jury found for appellee in the sum of $53.75. Judgment was entered against appellant for the amount of the verdict and costs, and that company has appealed to this court. An inspection of the record discloses that neither the motion for a new trial, nor the instructions in the case, are contained in the bill of exceptions.

The rule is well settled in this state that where the trial is by jury, the errors relied on for a reversal on appeal, must first have been brought to the notice of the

Term 1v, C. October Term, 1915.

Appellee

v. } Appeal from Jones.

J. Graham Lat Company,

Appellant.

Appellee claims a balance due plaintiff company, from appellant, a corporation doing business at Smyrna, Tennessee, and to collect the same, sued out a writ of attachment before a justice of the peace in said county, filed, which is caused to be served on two of appellant's traveling customers in that county. There was a judgment against the company from which an appeal was taken to the circuit court, where the jury found for appellee in the sum of $10.16. Judgment was entered against appellant in the manner of the writ and duly, the latter appealed and assigned to this court. In interpretation of the second direction that neither the action nor the trial, nor the instructions in the case, are contained in the bill of exceptions.

The rule in all matters in this state, that the trial judge in a jury, the errors noted on her a general, must have been brought to the notice of

trial court by a motion for a new trial that they may be corrected in that court. The clerk has copied into the transcript of the record made by him what purports to be a motion for a new trial and also what are claimed to be the instructions in the case, but that does not make them a part of the record for our consideration, as these are matters which must be vouched for and certified to by the trial judge and not by the clerk of the court.

In Call v. The People, 201 Ill. 499, these questions are fully reviewed and determined and the court's opinion therein together with the cases referred to, leave no room for argument. In that case it is said, "It is not sufficient that the clerk copy into the transcript of the record made by him a copy of the motion for a new trial, it must be made a part of the bill of exceptions, the rule being that no grounds other than those set out in the motion for a new trial, will be considered by this court in reviewing the judgment of the trial court, it is important that we know what that motion contained. This knowledge can come to us only through the bill of exceptions."

In the case of C.B.& Q.R.R.Co. v. Hazelwood, 194 Ill. 69, referred to in the case last above mentioned, it is said, "The instructions do not appear in the bill of exceptions...We find in the record immediately following the bill of exceptions, copies of instructions, but nothing in the bill serves to identify these instructions as being those referred to in the bill of exceptions. The certificate of the clerk is to the effect that these instructions are copies of those given or refused by the court. This certificate

trial court by a motion for a new trial that they may be corrected in that court. The state has cited into the transcript of the record made by the court reporter to be motion for a new trial and also that are filed in the instructions in the case, but this does not make them a the record for our consideration, so there are matters which must be vetoed for and certified to by the trial judge and not by the clerk of the court.

In Coll v. The Issue, 20 Ill. 333, there our-

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cation therein together with the cases referred to, leave no room for argument. In that case it is said, "It is not sufficient that the clerk copy into the transcript of the record made by him a copy of the motion for a new trial, it must be made a part of the bill of exceptions, the rule being that a record other than those set out in the motion for a new trial, will be considered by this court in reviewing the judgment of the trial court, it is important that we know what that matter contained. This knowledge can come to us only through the bill of exceptions."

In the case of C.,B.&Q.R.R. Co. v. Lindstrom, 164 Ill. 69, referred to in the case just above mentioned, it is said, "the instructions do not appear in the bill of exceptions...we find in the record immediately following the bill of exceptions, copies of instructions, but nothing in the bill serves to identify these instructions as being those referred to in the bill of exceptions. The certificate of the clerk is to the effect that these instructions are copies of those given or refused by the court. This certifica-

has no virtue to bring these instructions to our judicial notice."

Appellant claims that upon the facts in this case the verdict and judgment should have been in his favor also that appellant was prejudiced by remarks made by the trial judge. Whether or not these reasons were set out in the motion for a new trial in the court below, we cannot know as that knowledge could only properly come to us through the bill of exceptions. The grounds upon which the motion for a new trial was based, not appearing in the bill of exceptions, the presumption is that the trial court properly overruled the same. It must also be presumed so far as this appeal is concerned, that the evidence was sufficient to support the verdict and judgment and that the remarks of the court complained of, did not effect the verdict. Notwithstanding the fact that the record does not properly present the question as to whether the verdict was supported by the proof, which is the principal question relied on by appellant for a reversal of the judgment, we have examined the record and find that the proofs were amply sufficient to sustain the same.

It appears that appellee had worked as a traveling salesman for appellant for a number of years, that his salary was based on the amount of his sales and had been changed several times on that account; that in December, 1914 when he was getting $125 a month, appellant complained of appellee's work and the question of reducing his salary was discussed, but that this was not done as appellee represented he would increase his sales; that appellee was paid his salary for that month and the following month,

ion no virtue to bring these instructions to our judicial notice."

Appellant claims that upon the facts in this c the verdict and judgment should have been in his favor o that appellant was prejudiced by remarks made by the tri judge. Whether or not these remarks were put in the motion for a new trial in the court below, is immaterial be that inquiries could only properly come to us through the bill of exceptions. The grounds upon which the motio for a new trial was based, not appearing in the bill of exceptions, the presumption is that the trial court prop overruled the same. It must also be presumed up for in support is concerned, that the evidence was sufficient to support the verdict and judgment and that the remarks of the court complained of, did not affect the verdict. Not withstanding the fact that the record does not correctly present the question as to whether the verdict was support by the proof, which is the criminal question relied on appellant for a reversal of the judgment, we i. ve examine the record and find that the proofs were amply sufficient sustain the verdict.

It appears that appellee had worked as a travel ing salesman for appellant for a number of years, that his salary was based on the amount of his sales and had been changed several times on that account; that in December, when he was getting $125 a month, an effort complained of appellee's work and the question of reducing his salary was discussed, but that time was not done as appellee re reported he would increase his sales; that appellee was paid his salary for that month and the following month,

but on February 18, 1915, he left appellant's place of business in Memphis, came to his home in Illinois and never returned to work. It was for his last month's salary that suit was brought and the verdict appears to cover the portion of the month he worked. Appellant claimed that appellee had been overpaid by reason of his not working full time and that he quit without appellant's consent. On the other hand appellee contends, and there is evidence to show, that his duties as a traveling salesman for appellant, did not consume all his time and that he had fully performed his contract, also that he had quit with appellee's consent and on its suggestion. While these points were controverted, there was sufficient proof to fully sustain the claims of appellee. The judgment in this case will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 27th *day of April A. D. 1916.*

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and sixteen, the same being the 28th day of March, in the year of our Lord, one thousand nine hundren and sixteen

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff*

And afterwards, to-wit: On the Seventeenth *day of April, A. D. 1916, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Jacob Schulz,
Appellant.

vs.

No. 14.

October Term, 1915

William Kaiser,
Appellee.

ERROR TO
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. W. B. HADLEY

Term No. 14. October Term, 1915. Agenda No.4.

Jacob Schulz, Appellant.	)	
v.	)	Appeal from St. Clair.
William Kaiser, Appellee.	)	

Opinion by Higbee, P. J.

------O------

Appellant owned one hundred and twenty acres of land in St. Clair county, Illinois, and appellee rented and occupied an adjoining farm. On the morning of October 17, 1914, four cattle belonging to appellee crossed the division line between the two farms at a place where there was no fence and went over a field of appellants sowed to winter oats and another which was in clover, both of which it is claimed they injured. They were discovered about noon and driven back by appellee and his brother. On December 16, 1914, appellant brought suit in trespass against appellee, placing his damages at $10. Appellant was defeated before the justice where the suit was instituted, and also in the circuit court, to which an appeal was taken. His motion for a new trial was overruled and he brings the record to this court for review, complaining among other things that there was prejudicial error in the instructions. That the cattle

entered appellant's farm and passed over his fields within a short time after a rain and left tracks in the soft ground, is conclusively shown in the evidence, but as to what damage, if any, was caused to the land or crops, is disputed. Appellee says in his brief that it is not disputed that his cattle got upon the land of appellant at the time in question, and while he does not deny that he would be liable for any damages done by his cattle to the lands or crops of appellant, he contends that the evidence in the case does not show that his cattle did any damage to appellant's land, and therefore the judgment of the circuit court should be sustained.

The court instructed the jury on behalf of appellee, "The plaintiff is required by law to prove his case by the greater weight of the evidence and even though you may believe from the evidence that the defendant's cattle entered upon the land of the plaintiff, still unless you further believe from the evidence, that the plaintiff's crops or lands were injured thereby, then you should find for the defendant." Following this theory the court refused an instruction offered by appellant which told the jury, "that every unauthorized entry upon the lands of another is a trespass, for which an action will lie, and the law implies damages to the owner, and in the absence of proof as to the extent of the injury, is entitled to recover nominal damages"; and also refused several other instructions to the same effect. The instruction above referred to, as given for appellee, was erroneous as applied to the facts in this case and those refused for appellant stated the law correctly and should have been given.

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Every unauthorized entry upon the land of another is a trespass and damages are implied from such trespass, for which an action will lie. Pfeiffer v. Grossman, 15 Ill. 53; Bulpit v. Matthews, 145 Ill.345; McPherson v. James 69 Ill.App.327; Walsh v. Hertzog, 154 Ill.App.503. In the case last cited, appellant found appellee's horse on his premises and refused, on demand, to give him up unless appellee paid $2 damages. Appellee sued in replevin and obtained judgment for possession of the horse. On appeal, the court reversed the judgment and in the opinion it is stated: "Counsel for appellee argues that the amount demanded was in excess of the actual damages done and that a tender was therefore rendered impracticable. Irrespective of whether or not appellant was entitled to the sum demanded as actual damages, he was at least entitled to nominal damages, as it is not disputed that the horse was taken up while trespassing upon his premises."

While the amount involved in this case is trivial and the injury done to appellant's field might well have been overlooked, or the damages settled, had it not been for the ill feeling between the parties to the suit, yet appellant was, as a matter of fact entitled to recover at least nominal damages and as the court erred in its instructions upon this question, the judgment must be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

very unauthorized entry upon the land of another is a trespass and damages are implied from such trespass, for which an action will lie. Hoffer v. Wrenshall, 16 111. 324; Knight v. Smithers, 16 111.364; Zeisberger v. Jones 63 111.267; Hahn v. Kestner, 124 111.1 p.224. In the case at bar, appellant found appellee's horse on his premises and reduced, on demand, to give him no more possession until 50 damages. Appellee sued in replevin and obtained judgment for possession of the horse. On appeal, the court reversed the judgment and in the opinion it is stated: "Counsel for appellee argues that the amount demanded was in excess of the actual damages done and that a [illegible] of wrongs or not appellant was entitled to the sum demanded as actual damages, he was at least entitled to nominal damages, as it is not disputed that the horse was taken up while trespassing upon his premises."

While the amount involved in this case is trivial and the injury done to appellant's field was well nigh have been exterminated, or the damages settled, had it not been for the ill feeling between the parties to the suit, yet nominal damages, as a matter of fact entitled to recover at least nominal damages and by the court erred in its instructions upon this proposition, the judgment must be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in Ill.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said court at Mt. Vernon, this 24th *day of April A. D. 1916.*

C. C. Johnson

Clerk of the Appellate Court.

PINION

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